(20,648.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 270.

ALBERT H. RUSCH, PLAINTIFF IN ERROR,

vs.

JOHN DUNCAN LAND AND MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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1 STATE OF MICHIGAN:

Supreme Court.

JOHN DUNCAN LAND AND MINING COMPANY, Complainant and Appellant,

vs.

ALBERT H. RUSCH, Defendant and Appellee.

Appeal from Gogebic County.

STATE OF MICHIGAN:

The Circuit Court for the County of Gogebic. In Chancery.

To the Circuit Court for the County of Gogebic, in Chancery:

Your orator, the John Duncan Land and Mining Company, a corporation organized under the laws of the State of Michigan, of Escanaba, Michigan, respectfully represents unto the Court, as follows:

First. That it is the owner in fee simple of the north half (N. ½) of section twelve (12), in town forty-seven (47) north, range forty-two (42) west, Gogebic County, Michigan.

Second. That said land is of great value, to-wit, upwards of one hundred dollars.

Third. That Albert H. Rusch, of Reedsville, Wisconsin, holds a certain tax deed issued by the Auditor General of the State of
2 Michigan, covering the above described land, for the delinquent taxes of 1889 to 1901, both inclusive, for which he paid six hundred and forty-eight dollars and seventy-four cents ($648.74) as your orator is informed and believes. That said tax deed was issued by the Auditor General after the provisions of Act No. 229 of the Laws of 1897 went into effect, and that a certain tax notice, alleged to have been given under the provisions of that Act, is claimed to have been served by said Albert H. Rusch, defendant herein, upon Patrick A. O'Donald, James B. Peters and Mrs. Sarah T. Draper, in the County of Saginaw, Michigan, on the twenty-first day of October, A. D. 1902, and upon Henry Gamble, in the County of Alger, on the thirtieth day of October, A. D. 1902, copy of which, with the returns of the sheriffs serving the same, is hereto annexed, marked Exhibit "1."

Fourth. And your orator alleges that the tax notice, and the service thereof, as shown by the returns of the sheriffs making such service, is ineffective, and the service of such notice does not comply with the provisions of the tax law, and said notice, and the service thereof, is void, for the following reasons:

1. Because the notice omits the first paragraph of the notice given in the statute, namely: "To the owner or owners of the land herein described, and to the mortgagee or mortgagees named in all undis-

charged recorded mortgages against said land, or any assignee thereof of record."

2. Because the amount of the tax is not separately given for each description of land contained in said notice, but is given in a lump sum covering eight descriptions of land.

3. It does not appear in the return of the sheriff of Alger County, who claims to have served the notice upon Henry Gamble, that he had jurisdiction to make such service, it not appearing from such return that said Gamble was a resident of the County of Alger, in which the alleged service was made.

3 4. Because it does not appear in the return of the sheriff of Saginaw County, who claims to have served the notice upon Patrick A. O'Donald, James B. Peters and Charles S. Draper, that said parties, or either of them, were residents of the County of Saginaw at the time said service was made; there is no allegation that Charles S. Draper was dead, and the service of the notice upon Mrs. Sarah T. Draper, wife of Charles S. Draper, deceased, does not comply with the statute.

5. Because a copy of the notice appears to have been served in each instance, instead of the original, as required by the statute.

6. Because it does not appear, in and by the returns of the sheriffs serving such notices, that the service was upon the grantee under the last recorded deed in the regular chain of title to said land, or upon the mortgagee named in an undischarged recorded mortgage upon said land, or upon the assignee of an undischarged recorded mortgage upon said land, or the grantee under the last recorded tax deed issued by the Auditor General of the State of Michigan against said land.

Fifth. And your orator alleges that said defendant now claims absolute title to the land described, by virtue of his said tax deed and of the tax notice which he claims to have served upon the parties therein described, because the six months allowed for redemption has expired, and because such redemption has not been made.

Sixth. And your orator alleges that it has offered to pay said defendant the amount of money which he paid for said tax deed from the Auditor General, together with 100 per cent. additional thereto, and five dollars for each description of land contained in said notice, and the fees of the sheriffs for serving said notices, for a reconveyance of said land, but said defendant has declined to accept said offer and to reconvey said land to your orator.

Seventh. And your orator alleges that said tax deed from the Auditor General to said defendant, and said tax notice, with

4 the returns of the sheriffs, which are on file in the office of the county clerk of the County of Gogebic, and which upon their face show that the period of redemption has expired, are a cloud upon the title of your orator to the land therein described.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, and to the end that said Albert H. Rusch, who is made party defendant to this bill, may be required to make full, true and direct answer thereto, your orator prays:

1. That said tax notice, and the service or attempted service thereof, be declared to be null and void, and that said notice, and

said alleged service thereof, be set aside by proper decree of this court.

2. That said defendant be decreed to reconvey to your orator the land described in said tax deed, upon the payment to him of the amount which he paid for said tax deed, together with 100 per cent. in addition thereto, and an additional sum of five dollars for each description of land contained in said deed, less the costs of this court, including a reasonable solicitor's fee.

And that your orator may have such other and further relief in the premises as to this court shall seem meet.

And your orator prays that a subpœna may be issued out of and under the seal of this honorable court for the appearance of said defendant.

JOHN DUNCAN LAND AND MINING COMPANY,
By J. F. CAREY, *Secretary, Complainant.*

J. F. CAREY,
Solicitor for Complainant.

Business Address: Escanaba, Mich.

5 EXHIBIT "1."

To Patrick A. O'Donald, Charles S. Draper and Henry Gamble, Owners of, and James B. Peters, the Holder of Tax Title to the Lands Herein Described:

Take notice, that sale has been lawfully made of the following described land for unpaid taxes thereon, and that the undersigned has title thereto under tax deed issued therefor, and that you are entitled to a reconveyance thereof at any time within six months after service upon you of this notice, upon payment to the undersigned of all sums paid upon such purchase, together with one hundred per cent. additional thereto, and the fees of the sheriff for the service or cost of publication of this notice, to be computed as upon personal service of a declaration as commencement of suit, and the further sum of five dollars for each description, without other additional costs or charges. If payment as aforesaid is not made, the undersigned will institute proceedings for possession of the land.

Description of Land.

Lot.	Block.	Plat, addition, or other description.	Sec.	Tw'n.	R'ge.	Am't paid.	
						Dols.	Cts.
		N. E. ¼ of N. E. ¼	12	47	42		
		N. W. ¼ of N. E. ¼	12	47	42		
		S. W. ¼ of N. E. ¼	12	47	42		
		S. E. ¼ of N. E. ¼	12	47	42		
		N. E. ¼ of N. W. ¼	12	47	42	648	74
		N. W. ¼ of N. W. ¼	12	47	42		
		S. W. ¼ of N. W. ¼	12	47	42		
		S. E. ¼ of N. W. ¼	12	47	42		

Gogebic County, Michigan.

Taxes for years 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900 and 1901.

Yours respectfully, ALBERT H. RUSCH.

Place of Business: Reedsville, Wisconsin.
Dated Oct. 18, 1902.

6 STATE OF MICHIGAN, *County of Alger, ss:*

I do hereby certify and return, that on the 30th day of October, A. D. 1902, I served the within and foregoing notice on Henry Gamble, one of the owners of the land therein described, and to whom said notice is directed and addressed, by personally delivering to said above named person in said County of Alger, a true copy of said notice.

JAS. G. GIBSON, *Sheriff.*

My fees, $8.45.

STATE OF MICHIGAN, *County of Saginaw, ss:*

I do hereby certify and return, that on the 21st day of October, A. D. 1902, I served the within and foregoing notice on Mrs. Sarah T. Draper, wife of Charles S. Draper, deceased, and James B. Peters and Patrick A. O'Donald, and to whom said notice is directed and addressed, by personally delivering to said above named person in said County of Saginaw, a true copy of said notice.

HENRY A. NEWTON, *Sheriff.*

My fees, $3.60.
Sheriff's Return filed Mar. 26, 1903.
Bill of complaint filed Jan. 16, 1905.

7 STATE OF MICHIGAN:

The Circuit Court for the County of Gogebic. In Chancery.

To the Circuit Court for the County of Gogebic, in Chancery:

JOHN DUNCAN LAND AND MINING COMPANY, Complainant,
vs.
ALBERT H. RUSCH, Defendant.

The answer of Albert H. Rusch, defendant, to the bill of complaint of the John Duncan Land and Mining Company, filed in the above entitled cause.

This defendant, Albert H. Rusch, saving and reserving to himself all manner of benefit of exceptions and insufficiencies in said complainant's bill of complaint contained therein, in answer thereunto says:

1. Defendant denies each and every allegation contained in the first paragraph of said bill of complaint.

2. Defendant neither admits nor denies allegations contained in the second paragraph of complainant's bill of complaint.

3. Defendant admits each and every allegation contained in third paragraph of said bill of complaint.

4. Defendant denies each and every allegation contained in the fourth paragraph of said bill of complaint, and further answering, says, that the notices, and the service thereof, and the returns of the sheriffs making such service, is effective and is valid and as required by the statutes and law in such cases made and provided, for the following reasons:

a. Because the notices were addressed to Henry Gamble, Patrick A. O'Donald, Charles S. Draper, owners of, and James B. Peters, holder of the tax title to the lands therein described.

8 *b.* Because the notice informed the proper parties of the sale of taxes of the therein described lands.

c. Because the notices fully informed said parties that the undersigned had tax titles against the therein described lands.

d. Because the notices fully informed said parties of the time within which they could redeem said lands therein described.

e. Because the notices fully informed said parties to whom redemption money must be paid.

f. Because the notices fully informed said parties of the amount for which they could obtain a reconveyance of the lands therein described.

g. Because the notices fully informed the said parties that if payment were not made, proceedings would be instituted for the possession of the lands therein described.

h. Because the notices informed the said parties of the descriptions of the lands redeemable.

i. Because the notices informed said parties of the amounts paid for tax deeds of the lands therein described.

j. Because the notices fully informed said parties of the years for which the taxes against the lands therein described were purchased.

k. Because the returns of service show that Henry A. Newton was the sheriff of Saginaw County and that James G. Gibson was the sheriff of Alger County.

l. Because the returns of service show that the notices were properly served by the sheriffs of the respective named counties.

m. Because the return of service by the sheriff of Alger County shows that notice was served upon Henry Gamble, to whom said notice was addressed.

n. Because the return of service of notice by the sheriff of Saginaw County shows that notice was served upon Patrick A. O'Donald, James B. Peters and Mrs. Sarah T. Draper, who were the proper parties to be served, by law.

9 *o.* Because the returns of service of notice by the sheriffs of Alger and of Saginaw Counties show that service was made by delivering to the persons therein directed and addressed, a true copy of said notice.

p. Because the returns of service of notice by the sheriffs of the named counties show the date upon which said services were made.

q. Because the returns of service of notice by said counties are endorsed upon the notices directed and addressed to the parties therein to be served.

r. Because the return of service of notice by the sheriff of Saginaw County shows that Charles S. Draper was dead.

s. Because the return of service of notice by the sheriff of Saginaw County shows that Sarah T. Draper was the wife of Charles S. Draper, deceased.

t. Because that on the 7th day of July, 1875, Charles S. Draper executed his last will and testament, by which he devised all his property to his wife, Sarah T. Draper, and also by said last will and testament, made his wife, Sarah T. Draper, the executrix of his estate; certified copy of which is hereto annexed and marked Exhibit "A."

u. Because a residuary legatee bond was approved and filed in the office of the Probate Court of the County of Saginaw, with Sarah T. Draper as principal, and Oscar F. Wisner and Lena R. Bartow as sureties, on September 19, 1892, copy of which is annexed hereto and marked Exhibit "B."

5. Defendants admits all allegations contained in fifth paragraph of said bill of complaint.

6. This defendant neither admits nor denies each and every allegation contained in sixth paragraph of said bill of complaint, but leaves complainant to his proofs.

7. Defendant, answering paragraph seven of said bill of complaint, admits that the tax notice, with the returns of the sheriffs, which are on file in the office of the county clerk of the County of Gogebic, show upon their face that the period of redemption

10 has expired, but defendant further answering, denies that said notices, with the returns of the sheriffs, constitute a cloud

upon title to complainant's claim, and defendant, answering further, says that said tax deed does not constitute a cloud upon the title or claim of complainant, for the reason that defendant has absolute title to the lands therein described.

8. This defendant, further answering, says that complainant is not entitled to the relief prayed, because complainant does not allege in said bill of complaint that the proper parties did not have notice that the lands therein described in said notices were sold for taxes.

9. Defendant, further answering, says that said bill of complaint does not allege that complainant has deposited with the register in chancery any sum or sums for redemption.

10. Defendant, further answering, says that Act 229, P. A. 1897, with amendments thereto, violates Sec. 20, Art. IV, of the Constitution of Michigan.

11. This defendant, further answering, says that Act 229, P. A. 1897, with amendments thereto, violates Sec. 23 of Art. IV, of the Constitution of Michigan.

12. Defendant, further answering, says that Act 229, P. A. 1897, with amendments thereto, violates Sec. 25, Art. IV, of the Constitution of Michigan.

13. Defendant, further answering, says that Act 229, P. A. 1897, with amendments thereto, violates Sec. 32, Art. VI, of the Constitution of Michigan, and

14. Defendant, further answering, says that Act 229, P. A. 1897, with amendments thereto, violates the 14th amendment of the Constitution of the United States.

And this defendant, in consideration of the above, asks that the bill of complaint in the above cause be dismissed, with such reasonable costs and charges as under the rules and practice of this Court shall be just and proper.

11 And this defendant will ever pray.

ALBERT H. RUSCH,
By REED & BROWN,
Solicitors for Defendant.

Business Address: Lansing, Mich.

EXHIBIT "A."

I, Charles Stuart Draper, of East Saginaw, Michigan, being of sound mind, do hereby make, ordain and publish this, my last will and testament.

First. I desire that out of any estate I may leave at my decease, all my debts shall be paid.

Second. I hereby devise to my beloved wife, Sarah T. Draper, all my estate, both real and personal, of whatsoever name and nature.

Third. I hereby constitute and appoint my said wife the sole executrix of this, my last will and testament.

Witness my hand and seal, at East Saginaw, Michigan, this 7th day of July, A. D. 1875.

CHARLES STUART DRAPER. [SEAL.]

We, the undersigned, have witnessed the signing of the above instrument by Charles Stuart Draper, who, in our presence and hearing, declared the same to be his last will and testament, and at his request, and in his presence, and in the presence of each other, we subscribe our names as witnesses, this 7th day of July, A. D. 1875.

JOHN J. WHEELER,
Of East Saginaw, Michigan.
GEORGE B. BERGEN,
Of East Saginaw, Mich.

12 EXHIBIT "B."

Probate Court for Said County.

STATE OF MICHIGAN, *County of Saginaw, ss:*

In the matter of the estate of C. Stuart Draper, deceased.

Know all Men by these Presents, that we, Sarah T. Draper as principal, and Oscar F. Wisner of Saginaw, Lena R. Bartow as sureties, within the State of Michigan, are holden and stand firmly bound and obliged unto Ferdinand Brucker, Esq., judge of probate, in and for the said County of Saginaw, in the sum of two hundred dollars, lawful money of the United States of America, to be paid unto the said judge of probate, his successors in said office or assigns; to the true payment whereof, we do bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, for the whole, and in the whole, firmly by these presents.

Sealed with our seals. Dated the 19th day of September, Anno Domini one thousand eight hundred and ninety-two.

Whereas, the above bounden, Sarah T. Draper, has been appointed by the probate court of said County of Saginaw, executrix, the last will and testament of Charles Stuart Draper, late of said county, deceased; now the condition of this obligation is such, that if the above bounden, Sarah T. Draper, shall well and truly perform, observe and keep the conditions following, to-wit:

First. That she shall pay all the debts and legacies of the said testator, Chas. Stuart Draper.

Second. That she shall perform all orders and decrees of the Probate Court aforesaid, by the said Court ordered and directed to be performed in the premises;

Then this obligation to be void and of no effect, or else to abide and remain in full force and virtue.

SARAH T. DRAPER. [L. S.]
OSCAR F. WISNER. [L. S.]
LENA R. BARTOW. [L. S.]

13 SAGINAW COUNTY, *ss:*

At a session of the Probate Court in and for said county, holden at Saginaw, on the nineteenth day of September, A. D. 1892.

I have examined and do approve the foregoing bond, and order the same to be filed and recorded in the probate office of said county.

FERDINAND BRUCKER,
Judge of Probate.

STATE OF MICHIGAN, *County of Saginaw, ss:*

Oscar F. Wisner, one of the sureties in the foregoing bond, being sworn, says that he is worth the amount of the penalty of said bond over and above all debts and legal exemptions.

Subscribed and sworn to before me this 19th day of September, 1892.

LENA R. BARTOW,
Notary Public, Saginaw County, Mich.

Probate Court for said County.

STATE OF MICHIGAN, *County of Saginaw, ss:*

I, Charles F. Ganschow, register of probate of said county, do hereby certify that I have compared the foregoing copy of the last will and testament and bond, in the matter of the estate of Charles Stuart Draper, deceased, with the original record thereof, now remaining in this office, and have found the same to be correct transcripts thereof, and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said probate court, at Saginaw, this 20th day of April, A. D. 1905.

[SEAL.] CHARLES F. GANSCHOW,
Register of Probate.

Answer filed April 26th, 1905.
Replication filed April 27th, 1905.

14 STATE OF MICHIGAN:

The Circuit Court for the County of Gogebic. In Chancery.

JOHN DUNCAN LAND AND MINING COMPANY, Complainant,
vs.
ALBERT H. RUSCH, Defendant.

At a session of said court, held at the court house, in the City of Bessemer, in said County, on Tuesday, the 23rd day of May, A. D. 1905.

Present: Hon. Norman W. Haire, circuit judge.

The cause having come on to be heard upon the bill of complaint herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the proofs, oral, documentary and written, taken and filed in said cause, and having been argued by counsel for the respective parties;

Now, therefore, on consideration thereof, it is ordered, adjudged

and decreed, and the Court doth hereby order, adjudge and decree, as follows, viz:

That said defendant is the owner in fee simple of the legal and equitable titles to the north half (N. ½) of section twelve (12), in town forty-seven (47) north, range forty-two (42) west, Gogebic County, Michigan, and that said defendant is possessed of said lands.

That certain tax notices, as required by the provisions of Act 204, P. A. of 1899, were valid and a substantial compliance with the law thereof in every respect.

That the bill of the complainant be dismissed.

That complainant pay costs of the suit to be taxed, and that defendant have execution therefor.

NORMAN W. HAIRE,
Circuit Judge.

Decree filed Sept. 16, 1905.

15 STATE OF MICHIGAN:

The Circuit Court for the County of Gogebic. In Chancery.

JOHN DUNCAN LAND AND MINING COMPANY
vs.
ALBERT H. RUSCH.

Memorandum Opinion of the Court.

This is a bill, first to set aside a tax notice, and to compel the defendant to reconvey the land on payment of the taxes and the charges thereon and one hundred per cent. Defendant asks that the bill be dismissed for want of equity, because there is no showing made in the bill that any irregularities exist in the tax sale, and because the act under which some of the proceedings were taken is unconstitutional.

The complainant asks to have the tax notice set aside for purely technical reasons. The taxes were not paid on the descriptions, the lands were sold, deeds were issued, and notices were served to the parties interested. The time expired in which the parties might move for a writ of possession, and all steps were taken except the mere taking possession, when the complainant filed his bill for the relief as above stated. The Court will pass upon but one point, because all the others are practically decided by the decision of the first one. They are all of a similar character.

The complainant claims in his bill of complaint, as one reason why the notice should be set aside, that the notice omits the first paragraph of the form of notice given in the statute, namely:

"To the owner or owners of the land herein described, and to the mortgagee or mortgagees named in all undischarged recorded mortgages against said land, or any assignee thereof of record."

16 It is not claimed that the notice was not addressed to the proper party, or that it was not served upon the proper party,

but it is claimed that because these certain words were not used in the notice, that hence it is void and should be set aside. This point is practically decided against the complainant by the Supreme Court in a recent case, the case of Bradley *vs.* Williams, 102 Northwestern Reporter, 625, where it was held: "That after sale for delinquent taxes of the interest of the owner of the fee, a notice to him by the purchaser sufficiently complied with the statute, though it was addressed to him as mortgagee."

Now, in that case the owner of the land had had a notice addressed to him as mortgagee. He undertook to set up that it was not a proper notice. The Supreme Court held that the defect, if any, was merely technical; that the notice sufficiently complied with the statute, although it addressed the owner as mortgagee.

All the other points set up in the bill of complaint are of a similar nature to this. As a matter of fact, the statute in the present case was substantially complied with in every respect. It is not claimed that any real notice was not given, but that because of some technical defect in its wording, that it was deficient. Neither is it claimed that such defenses to tax titles are not good, as see the case just cited. The other matters raised by the bill of complaint are even more trivial technicalities than this, and will be ignored and dismissed by the Court.

The question of the constitutionality of the Act 229, P. A. of 1897, with amendments thereto, has been called in question by the defendant, but it is not necessary, in view of the above holding, for the Court to pass upon that question. The bill of complaint will be dismissed, with costs in favor of the defendant.

NORMAN W. HAIRE,
Circuit Judge.

17 STATE OF MICHIGAN:

The Circuit Court for the County of Gogebic. In Chancery.

JOHN DUNCAN LAND AND MINING COMPANY, Complainant,
vs.
ALBERT H. RUSCH, Defendant.

It is hereby stipulated, by and between the solicitors for the respective parties in the above entitled cause, that upon trial in the court below, the complainant offered the following documentary evidence, which was received, viz:

1. Quit-claim deed from Patrick A. O'Donald and wife to Ole Erickson.
2. Certified copy of will of Charles S. Draper, and order admitting same to probate.
3. Quit-claim deed from Sarah T. Draper to Ole Erickson.
4. Quit-claim deed from James B. Peters and wife to Ole Erickson.
5. Quit-claim deed from Ole Erickson and wife to the John Duncan Land and Mining Company; all of said instruments conveying the lands described in the bill of complaint.

6. Articles of incorporation of the John Duncan Land and Mining Company.

7. Record of tax deed from Auditor General to Albert H. Rusch, dated Aug. 25, 1902, conveying the following described lands: Northeast quarter of northeast quarter, northwest quarter of northeast quarter, southwest quarter of northeast quarter, southeast quarter or northeast quarter and the northeast quarter of northwest quarter of Sec. 12, T. 47 N., R. 42 W., for the delinquent taxes of 1895, 1896, 1897 and 1898, for one consideration of $150.40.

18 8. Record of tax deed from Auditor General to Albert H. Rusch, dated Aug. 25, 1902, conveying the following described lands: northwest quarter of northwest quarter, southwest quarter of northwest quarter, southeast quarter of northwest quarter of Sec. 12, and the southeast quarter of northwest quarter of Sec. 18, in T. 47 N., R. 42 W., for the delinquent taxes of the years 1895, 1896, 1897 and 1898, for one consideration of $120.32.

9. Tax rolls for the Township of Marinesco, for the years 1895, 1896, 1897 and 1898, showing that in each of said years the lands described in said tax deeds were assessed as forty-acre descriptions.

It is further stipulated, that before the commencement of this suit, and at a time when more than six months had expired from the date of the filing of the proof of service of defendant's tax notices, as required by Act 229, P. A. of 1897, and amendments thereto, complainant offered to pay defendant the statutory amount to redeem the lands described in complainant's bill and in the tax notice, copy of which is attached to complainant's bill, namely, the full amount as stated in the tax notice, together with 100 per cent. thereof and $5.00 for each description and the costs of service, and defendant refused to accept such offer.

It is further stipulated, that complainant offered oral evidence that the land described in the bill of complaint is worth $5,000.00, and that same is unoccupied and vacant land, and has never been occupied.

It is further stipulated, that defendant, at the time of service of his tax notice, had a tax certificate for the purchase of said lands for the taxes of the year 1899, and later received two deeds, each of which, for one consideration, conveyed separate and distinct 160 acres of said described lands, and for the taxes of the years 1890 and 1899, said defendant had tax certificates for the purchase of said described land, and subsequently received a separate and

19 distinct deed for each forty acres of said described lands, for one consideration, for the years of taxes as aforesaid. And that defendant paid the taxes for the other years, as stated in the tax notices, as a condition of purchase, and that all deeds were delivered by said Auditor General to said defendant.

It is further stipulated, that each of said tax deeds *were* in the usual form issued by the Auditor General, and that each contained the following paragraphs:

"This indenture, Made — day of —— in the year of our Lord one thousand nine hundred and — between John F. Wilkinson,

Deputy Auditor General of the State of Michigan, of the first part, and Albert H. Rusch;

That Whereas, in pursuance of the provisions of law, the said party of the second part, on the — day of —— A. D. 190–, became the purchaser of the rights of the State, in and to the following described lands, situate in the County of Gogebic, in said State, which were bid off to the State for the taxes assessed thereon in the year ——, to-wit: (Here lands are described).

And Whereas, The said party of the second part obtained —— certificate from the Auditor General for the purchase of the above described lands, according to law, and paid to the State Treasurer upon said certificate, the sum of —— Dollars and — Cents, being the amount of purchase money therefor, as provided by law, which certificate has been presented and surrendered to the said Deputy Auditor General;

Now, Therefore, This Indenture Witnesseth, That the said John F. Wilkinson, Deputy Auditor General of the said State of Michigan, in the Name of the People of said State, and by virtue of the authority vested in him by the laws thereof, in consideration of the premises, and the payment of the purchase money above mentioned, the receipt whereof is hereby confessed and acknowledged, does by these presents remise, release and quitclaim unto the said Albert H. Rusch, party of the second part, and to his heirs and assigns, Forever, all the rights acquired by the State in virtue of the original sale or sales to the State in the premises above described, subject to all taxes assessed and levied on said lands subsequent to the taxes for which said land was bid off in the name of the State as aforesaid:

Provided, However, That this indenture is subject to the relevant conditions imposed by Act 229 of the Public Acts of 1897, as amended.

In Testimony Whereof, The said John F. Wilkinson, Deputy Auditor General as aforesaid, has hereunto set his hand and seal, the day and year first above written.

JOHN F. WILKINSON,
Deputy Auditor General of the State of Michigan.

Signed, Sealed and Delivered in Presence of:

—— ——.

STATE OF MICHIGAN, *County of Ingham, ss:*

On this — day of —— A. D. 190–, before me, a notary public in and for said county, personally came the above named John F. Wilkinson, Deputy Auditor General of said State, known to me to be the person who executed the foregoing instrument, and acknowledged the same to be his free act and deed.

—— ——,
Notary Public, Ingham County, Michigan.

My commission expires ——."

21 It is further stipulated, that each of said tax deeds *were* duly executed and delivered to the said defendant.

J. F. CAREY,
Solicitor for Complainant.
O. H. REED,
Solicitor for Defendant.

Filed Oct. 27th, 1905.

The cause was duly appealed to the Supreme Court of the State of Michigan, whereupon the following proceedings were had:

22 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the ninth day of February in the year of our Lord one thousand nine hundred and six.

Present, the Honorable William L. Carpenter, Chief Justice, Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, Associate Justices.

#21425.

JOHN DUNCAN LAND AND MINING COMPANY
vs.
ALBERT H. RUSCH.

This cause coming on to be heard is duly submitted on briefs.

23 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the ninth day of July in the year of our Lord one thousand nine hundred and six.

Present, the Honorable William L. Carpenter, Chief Justice, Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, Associate Justices.

#21425.

JOHN DUNCAN LAND AND MINING COMPANY
vs.
ALBERT H. RUSCH.

In this cause an opinion is filed in accordance with which a decree *a decree* will be hereafter entered.

24 Supreme Court of the State of Michigan.

JOHN DUNCAN LAND AND MINING COMPANY, Complainant and Appellant,
vs.
ALBERT H. RUSCH, Defendant and Appellee.

Opinion.

Before Grant, Blair, Montgomery, Ostrander and Hooker, Justices.

The bill of complaint, filed January 16, 1905, by one claiming to be the owner of the original or government title to the north half of section twelve, in town 47 north of range 42 west, prays that a certain tax notice and the service thereof be declared void and be set aside, and that defendant be required to convey to complainant said land upon payment of the amount he paid for a certain tax deed, plus one hundred per cent. and plus the additional sum of five dollars for each description of land contained in the deed, less the costs of this proceeding. There was a decree dismissing the bill of complaint. It appears that complainant had no title to the premises when the tax notices were served. The original record title was in Patrick A. O'Donald, Charles S. Draper and Henry Gamble, and James B. Peters was holder and owner of a recorded tax deed. The tax notices were addressed to these persons respectively and were served upon each of them, except Charles S. Draper. Mr. Draper was dead. By his will, duly probated, his wife, Sarah T. Draper, was made sole executrix and devisee, and on September 19, 1892, she had filed her approved bond, conditioned to pay all debts, etc. The notice was served on Mrs. Draper, who is described in the return made by the sheriff as "wife of Charles S. Draper, deceased." Complainant thereafter derived its title to the land by quit-claim deeds from the owners above named, including Mrs. Draper, but at what particular date or dates neither the record nor the briefs afford information. The notice is here set out:

"To Patrick A. O'Donald, Charles S. Draper and Henry Gamble, owners of, and James B. Peters, the holder of, tax title to the lands herein described:

Take Notice, that sale has been lawfully made of the following described land for unpaid taxes thereon, and that the undersigned has title thereto under tax deed issued therefor, and that you are entitled to a reconveyance thereof at any time within six months after service upon you of this notice, upon payment to the undersigned of all sums paid upon such purchase, together with one hundred per cent. additional thereto, and the fees of the sheriff for the service or cost of publication of this notice, to be computed as upon personal service of a declaration as commencement of suit, and the further sum of five dollars for each description, without other additional costs or charges. If payment as aforesaid is not made, the undersigned will institute proceedings for possession of the land.

25 *Description of Land.*

Plat, addition, or other description.	Sec.	Township.	Range.	Am't paid.
				Dols. Cts.
N. E. ¼ of N. E. ¼	12	47	42	
N. W. ¼ of N. E ¼	12	47	42	
S. W. ¼ of N. E. ¼	12	47	42	
S. E. ¼ of N. E. ¼	12	47	42	
N. E. ¼ of N. W. ¼	12	47	42	648 74
N. W. ¼ of N. W. ¼	12	47	42	
S. W. ¼ of N. W. ¼	12	47	42	
S. E. ¼ of N. W. ¼	12	47	42	

Gogebic County, Michigan.

Taxes for years 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900 and 1901.

Yours respectfully, ALBERT H. RUSCH.

Place of Business: Reedsville, Wisconsin.
Dated Oct. 18, 1902."

It appears that defendant has a tax deed, dated August 25, 1902, conveying, by forty acre descriptions, the northeast quarter and the northeast quarter of the northwest quarter of the section for the taxes of 1895, 1896, 1897 and 1898 for a consideration of $150.40, and a deed of same date conveying by forty-acre descriptions the remainder of the north half of section twelve and the southeast quarter of section eighteen, same town and range, for a consideration of $120.32, for taxes of the same years. In the bill of complaint it is stated that defendant holds a certain tax deed conveying said premises for the delinquent taxes of 1889 to 1901, both inclusive, for which he paid six hundred and forty-eight dollars and seventy-four cents, "as your orator is informed and believes," and in the answer this allegation of the bill is admitted. The stipulated facts, however, are that at the time of the service of the notice defendant

"had a tax certificate for the purchase of said lands for the taxes of the year 1899, and later received two deeds, each of which, for one consideration, conveyed separate and distinct 160 acres of said described lands, and for the taxes of the years 1890 and 1899 said defendant had tax certificates for the purchase of said described land, and subsequently received a separate and distinct deed for each forty acres of said described lands, for one consideration, for the years of taxes as aforesaid. And that defendant paid the taxes for the other years, as stated in the tax notices, as a condition of purchase."

The land was listed for taxation in years 1895 to 1898, inclusive, in forty-acre descriptions. It is charged in the bill and admitted by the answer that the sheriff served the notice on Gamble and on Mrs. Draper by delivering a copy thereof.

Three objections to the sufficiency and effect of the tax notices are made in the brief for appellant.

(1) The amount of the taxes should have been specified by forty-acre descriptions;

(2) Copy of the tax notice instead of an original notice was served;

(3) The service upon Mrs. Draper was ineffective, the statute providing for service, in such cases, upon the executor or administrator of the deceased owner.

26 OSTRADER, *J.* (after stating the facts):

1. It has been decided (Williams *vs.* Olson, 12 D. L. N., 560; 104 N. W. Rep., 1101) that when a description of land has been sold for taxes of several years and a single tax deed issued to a purchaser from the state, the notice is good if it specifies the amount paid for the deed. We have held, also, that if the tax deed contains several descriptions of land, sold for the taxes of a single and the same year, the notice should specify the amount required to redeem each description. Jackson, *vs.* Mason, 12 D. L. N., 1038; 106 N. W. Rep., 1112. The statute, section 141, general tax law, expressly provides that the persons holding certain interests in the land, as grantees, mortgagees, shall be entitled to a reconveyance "of such interests in such lands so held." The usual method of assessment of unoccupied lands, outside of plats, is by a government description corresponding to the owner's holdings. It is not necessary, when one owner owns a section of land, to divide and to value it for taxation by forty-acre descriptions. It is a fair construction of the language of section 140 of the tax law, and one which accords with the purpose of the law, which requires that the notices given shall indicate the sum required to be paid to obtain a reconveyance of any description of land in the tax deed, whether sold and held for the taxes of one or for those of several years. This the notice here in question did not do. In other respects, the notice seems designed to convey as little intelligence as possible. It speaks of a single deed, and the meaning to be gathered from it is that a single deed conveying each of the eight forty-acre descriptions was issued for the taxes of thirteen years. It appears that at the time the notice was served defendant did not have deeds of portions of the lands for several of the years.

2. The statute requires service of a notice. The form of the notice is set out in the statute. The purpose of the notice is to direct the attention of the persons upon whom it is served to the fact that the land has been sold, and that a re-purchase of it may be made under conditions. We are not prepared to say that the legislature in the use of the words "a notice" in one part of the section and "a copy of said notice" in another part of the section meant to distinguish between a paper signed by the owner of the tax titles and a copy of that paper which conveyed exactly the same intelligence. The purpose of the act is accomplished when the necessary knowledge is acquired by the persons upon whom notice is required to be served. What the statute aims to have communicated to owners of land is

knowledge of the facts which the form of the notice is calculated to afford them. This knowledge is conveyed as well by a copy as by an original, and we are of opinion that a construction of the statute which would require that an original notice be in all cases served would be over-nice, and we shall decline to so hold. The service by copy was a sufficient service.

3. The notice in the case at bar was addressed to the owners, by name, and among those named was Charles S. Draper. This corresponded with the record. The notice was sent to the sheriff of Saginaw county and was served, by a copy, upon Mrs. Draper,
27 the widow. It appears that she was the proper person to whom notice should have been given, she being, in fact, the executor of the last will and testament of her deceased husband. The return of the officer does not indicate this fact. The question presented is whether the court shall accept the return of the officer which does not sufficiently, for the purpose of the statute, describe the person served, or the fact, made to appear, that the proper person was served. I think, for reasons set out in Williams *vs.* Olsen, *supra,* that the fact should control.

In the brief of counsel for the appellee it is urged that the averments of the bill of complaint show, affirmatively, that the proper persons had notice of the defendant's interest in the land; that more than six months elapsed after service of the notices before the bill was filed, and, as it does not appear that any one interested was deceived or injured, the court below was right in dismissing the bill of complaint. To this it may be replied that upon application by defendant for his writ of assistance the objections now made to the proceedings could be presented. Nor can it be properly said that the objections to the form of the notice are merely technical.

Defendant insists, also, that the statute provisions which have been considered are not constitutional because not within the title of the act and because in effect they provide for a forced transfer by one owning a title to lands. Various possible consequences of enforcement of the law are pointed out and claimed to amount to limitations of constitutional rights. It will not be profitable to follow, here, the discussion undertaken. The deeds which the defendant received from the state are expressly made subject to the relevant conditions imposed by act number 229., public acts of 1897, as amended. Whatever the title which the state held, it sold to defendant an interest in the lands which was liable to be divested.

The decree below is reversed. A decree will be entered in this court in conformity with the prayer of the bill upon payment to defendant of the amount tendered in the bill of complaint. It appearing that the complainant, before the filing of the bill, offered to pay to defendant the statutory amount to obtain reconveyance, complainant will recover costs of both courts.

RUSSELL C. OSTRANDER.
CLAUDIUS B. GRANT.
ROBERT M. MONTGOMERY.
CHARLES A. BLAIR.
FRANK A. HOOKER.

(Endorsed:) Filed July 9, 1907. Chas. C. Hopkins, Clerk.

28 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room in the Capitol, in the City of Lansing, on the 23d day of July in the year of our Lord one thousand nine hundred and six.

Present, the Honorable William L. Carpenter, Chief Justice; Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, Associate Justices.

#21425.

JOHN DUNCAN LAND AND MINING COMPANY
vs.
ALBERT H. RUSCH.

In this cause a motion for a rehearing is duly submitted.

29 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 24th day of July, in the year of our Lord one thousand nine hundred and six.

Present, the Honorable William L. Carpenter, Chief Justice; Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, Associate Justices.

#21425.

JOHN DUNCAN LAND AND MINING COMPANY
vs.
ALBERT H. RUSCH.

The motion for a rehearing, heretofore submitted herein, having been duly considered by the court, is hereby denied with costs to the complainant, to be taxed.

30 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventh day of November in the year of our Lord one thousand nine hundred and six.

Present the Honorable Aaron V. McAlvay, Chief Justice; William L. Carpenter, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, Associate Justices.

No. 21425.

JOHN DUNCAN LAND AND MINING CO., Complainant and Appellant,
vs.
ALBERT H. RUSCH, Defendant and Appellee.

This cause having been brought to this Court by appeal from the Circuit Court for the County of Gogebic, in Chancery and having

been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the Court, that the decree of the Circuit Court for the County of Gogebic, in Chancery be and the same is hereby reversed vacated and held for naught and that the tax notice described in the Bill of Complaint in said cause is null and void and that the service hereof is hereby set aside and vacated.

It is further ordered, adjudged and decreed that said defendant reconvey to the complainant within ten (10) days from the service upon complainant's solicitor of notice of entry of this decree, the lands described in the Bill of Complaint in said cause, upon payment to him of the sum of One thousand three hundred and thirty-seven dollars and forty-eight cents ($1337.48), that being the sum that said complainant paid for the purchase of tax deeds and payment of taxes as a condition of such purchase, upon said described lands for delinquent taxes for the years 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901. Said sum of One thousand three hundred thirty-seven dollars and forty-eight cents ($1337.48) including the one hundred per cent. penalty provided for by the Statute and the additional sum of Five Dollars for each description of land described in said tax notice.

And it is further ordered, adjudged and decreed that the complainant do recover of and from the defendant, the costs of both the Circuit Court and this Court to be taxed and that the amount of said taxed costs may be deducted by the complainant from the amount due the defendant above specified.

31 The Honorable, the Supreme Court of the United States:

Your petitioner, Albert H. Rusch, a resident of Reedsville, in the state of Wisconsin, respectfully shows:

I.

That he is a resident of Reedsville in the state of Wisconsin, and that in August A. D. 1902, he purchased from the Auditor General of the State of Michigan, certain tax deeds to the following described lands, to wit: Northeast quarter of Northeast quarter, Northwest quarter of Northeast quarter, Southwest quarter of Northeast quarter, Southeast quarter of Northeast quarter, Northeast quarter of Northwest quarter, Northwest quarter of Northwest quarter, Southwest quarter of Northwest quarter, and Southeast quarter of Northwest quarter, all in Section twelve, Town 47 North, Range 42 West, in the county of Gogebic, in the state of Michigan, for which he paid the sum of six hundred forty-eight dollars and seventy-four cents ($648.74) which amount was the sum of the delinquent taxes against said lands for the years to wit: 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, and 1901. That the lands are of great value to wit: upwards of five thousand dollars.

II.

That on January 16, 1905, the John Duncan Land and Mining Company, a corporation of the city of Escanaba and state of Mich-

igan, claimed to have acquired certain rights to above described premises, and that they acquired such rights by quit-claim deeds from Patrick A. O'Donald, Sarah T. Draper (widow of Charles S. Draper, deceased) and James B. Peters, who with Henry Gamble, were the parties in whom ownership to said lands was vested previous to the sale of said lands by judicial decree for said delinquent taxes, and that as such grantee of said parties, the said John Duncan Land and Mining Company claimed to have certain rights according to the provisions of Act 229 of the Public Acts of 1897, of the state of Michigan, and that on said date, January 16, 1905, the said John Duncan Land and Mining Company filed a bill of complaint in the circuit court for the county of Gogebic and state of Michigan, in Chancery, and served same by publication of subpœna upon your petitioner, praying that certain tax notices which were served
32 by your petitioner upon the said Patrick A. O'Donald, Charles S. Draper, James B. Peters, and Henry Gamble in accordance with the provisions of said Act No. 229, Public Acts of 1897, as amended, be declared void, and praying that your petitioner be compelled to convey all your petitioner's right, title and interest in and to said lands to the said John Duncan Land and Mining Company, in consideration of said company paying to your petitioner the sum of money which he had paid for these tax deeds, together with one hundred per cent. thereof, and five dollars for each description, and that said complainant company based its claim to obtain conveyances from your petitioner upon the provisions of Act No. 229, of the Public Acts of 1897, as amended.

III.

That your petitioner appeared by counsel in the cause, and that on the 25rd day of May, A. D. 1905, trial was had in the circuit court for the county of Gogebic, and state of Michigan, and that a decree was rendered in favor of your petitioner, and that said decree was filed on the 16th day of September, A. D. 1905, and that on the 17th day of October, A. D. 1905, appeal was taken by said complainant company to the Supreme Court of the State of Michigan, the same being the court of last resort in said state of Michigan, that a hearing on said appeal was had at the January, 1906, term of said Supreme Court of state of Michigan, and that on July 9, 1906, an opinion was filed by said Supreme Court of the state of Michigan wherein the decree of the circuit court for the county of Gogebic, was reversed, and that on July 11, 1906, counsel for your petitioner filed a motion with said Supreme Court for a rehearing of said cause, and that said motion was denied.

IV.

Your petitioner further shows that in his answer to said bill of complaint, he alleged that Act No. 229, Public Acts of 1897, as amended, under which said complainant company claimed the right to force your petitioner to convey to him within a prescribed time for a certain stated amount, all his right, title and interest in and to said lands, was contrary to Sections 20, 23, 25, of Article IV, and

Section 32 of Article VI of the constitution of the state of Michigan, and also contrary to the 14th amendment to the Constitution of the United States.

33 V.

And your petitioner further shows that notwithstanding said constitutional objections raised by him in his answer to said bill of complaint and maintained and urged by him upon trial in the circuit court for the county of Gogebic, and that such constitutional objections were maintained and urged by him on the hearing of the appeal in the Supreme Court of the state of Michigan, the said Supreme Court of the state of Michigan decided the cause against your petitioner, and in its opinion practically denied your petitioner the right to maintain said constitutional objections to said Act No. 229, Public Acts of 1897, as amended.

VI.

Your petitioner is advised by counsel and verily believes that upon trial of said cause in the circuit court for the county of Gogebic in chancery, and upon hearing of the appeal in the Supreme Court of the state of Michigan, there was drawn in question by your petitioner, the validity of the statute of the state of Michigan, on the ground that said statute was contrary to the Constitution of the state of Michigan, and that it was contrary to the 14th amendment of the Constitution of the United States, and that the decision of the said Supreme Court of the state of Michigan was against the right and privilege and immunity claimed by your petitioner, and that the effect of said decision of the said Supreme Court of the state of Michigan is a denial of the right, privilege and immunity claimed by your petitioner under said constitution of the state of Michigan and under the 14th amendment to the Constitution of the United States.

VII.

Annexed hereto is a copy of the record upon which the said cause was heard in the Supreme Court of the state of Michigan, to which your petitioner prays leave to refer.

VIII.

Wherefore your petitioner prays that a writ of error may issue on behalf of your petitioner from the Supreme Court of the United States to be directed to the Supreme Court of the State of Michigan, according to the rules and practise in such cases.

ALBERT H. RUSCH,
Petitioner.

O. H. REED,
Solicitor for Petitioner.

34 STATE OF WISCONSIN, *County of Manitowoc, ss:*

On this 4th day of September, A. D. 1906, personally appeared before me, Albert H. Rusch, who made oath that he had read the

foregoing petition by him subscribed, and that he knows the contents thereof, and that the same is true to his own knowledge except as to matters stated on information and belief, and as to those matters he believes the same to be true.

[Seal of Chas. Hein, Notary Public, Manitowac County, Wis.]

CHAS. HEIN,
Notary Public in and for the said County of Manitowoc.

My commission expires Dec. 27th, 1908.

34½ [Endorsed:] 21425. State of Michigan. In the Supreme Court. John Duncan Land and Mining Company, Complainant, *vs.* Albert H. Rusch, Defendant. Petition for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan. Allowed this Jan. 29th, 1907. John M. Harlan, Justice Sup. Ct. U. S. O. H. Reed, Solicitor for petitioner. Business address Lansing, Michigan.

35 (Copy.)

Bond.

Know all men by these presents, That we, Albert H. Rusch, a resident of the village of Reedsville, and State of Wisconsin, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto The John Duncan Land and Mining Company, a corporation of the State of Michigan in the full and just sum of Five Hundred and 00/100 dollars, to be paid to the said The John Duncan Land and Mining Company, its certain attorneys, executors, administrators, successors or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of February, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Supreme Court of the State of Michigan in a suit depending in said Court, between the said, The John Duncan Land and Mining Company, *as complainant,* as complainant and Appellant, and the said Albert H. Rusch, as defendant, a Decree was rendered against the said Albert H. Rusch and the said Albert H. Rusch having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the said decree in the aforesaid suit, and a citation directed to the said The John Duncan Land and Mining Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Albert H. Rusch shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

ALBERT H. RUSCH. [SEAL.]
AMERICAN SURETY CO. OF NEW YORK. [SEAL.]
By WILLIAM A. TAUE,
Its Resident Vice-Pres't.

Attest:

CAESAR D. MARKS, [SEAL.]
Its Resident Ass't Sec.

Sealed and delivered in presence of—
GRACE O. FRASER.
LENA SAFER.

Approved by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

36 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To John Duncan Land and Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein Albert H. Rusch is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this 13th day of February, in the year of our Lord one thousand nine hundred and seven.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

36½ On this first day of March, in the year of our Lord one thousand nine hundred and seven, personally appeared before me, the subscriber, Frank D. Mead, and makes oath that he delivered a true copy of the within citation to John F. Carey, the attorney for the John Duncan Land & Mining Company, at his office in City of Escanaba, Michigan, on the first day of March, 1907.

FRANK D. MEAD.

Sworn to and subscribed the 1st day of March, A. D. 1907.
ISOBEL M. BLAKE,
Notary Public, Delta County, Michigan.

My commission expires May 2, 1907.

37 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Duncan Land and Mining Company, complainant and appellant, and Albert H. Rusch, defendant and appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
38 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Albert H. Rusch as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of February, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of record hereto annexed.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. J. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Dated March 28, 1907.

39 Supreme Court of the State of Michigan.

ALBERT H. RUSCH, Plaintiff in Error,
vs.
JOHN DUNCAN LAND AND MINING COMPANY, Defendant in Error.

STATE OF MICHIGAN, *In Supreme Court, ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do heregy certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Judges of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the writ of error, the writ of error with allowance endorsed thereon, the citation with proof of service of copy thereof upon adverse party, and a copy of the bond to the adverse party, duly approved.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing, this twenty-eighth day of March in the year of our Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. J. HOPKINS,
Clerk Supreme Court of the State of Michigan.

40 The Supreme Court of the United States.

No. 683, Oct. Term, 1906.

ALBERT H. RUSCH, Plaintiff in Error,
vs.
THE JOHN DUNCAN LAND AND MINING COMPANY, Defendant.

Assignment of Errors.

Albert H. Rusch, plaintiff in error in the above entitled cause, makes the following assignment of errors to the determination of said cause by the Supreme Court of the State of Michigan in accordance with its opinuon filed July 9, 1906.

1. That the Supreme Court of Michigan erred in deciding that whoever accepts the tax deed is not in a position to complain of its provisions, under the provisions of law and facts in the case.

2. That the Supreme Court erred in refusing to consider the constitutionality of Act 229, of the Public Acts of the State of Michigan for 1897.

3. That the Supreme Court of the State of Michigan erred in its opinion and decision, and deprived the plaintiff in error of his property without due process of law, the equal protection of the laws, and abridging the privileges and immunities of its citizens.

4. Plaintiff in error further states that the opinion and determination of the Supreme Court of the State of Michigan, is repugnant to and in conflict with the First Section of the 14th Amendment to the Constitution of the United States, which declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. And plaintiff in error further states that there was drawn into question in this action, in the courts of the State of Michigan, his right to contest the legality and constitutionality of Act 229, of the Public Acts of the State of Michigan for 1897, and that the plaintiff in error was denied and refused the right to have his contentions determined, contrary to the provisions of the 14th amendment to which judgment, plaintiff in error excepts and assigns the same as error.

41 Wherefore said plaintiff in error prays that the judgment and decision of the Supreme Court of the State of Michigan may be reversed, annulled, and altogether held for naught, and that appellant may be restored to all things which he has lost by the action and because of said judgment and decision.

O. H. REED,
Attorney for Plaintiff in Error.

42 [Endorsed:] No. 683, Oct. Term, 1906. United States Supremem Court. Albert H. Rusch, Plaintiff in Error *vs.* John Duncan Land and Mining Company Defendant. Assignment of Errors. O. H. Reed, Attorney for Plaintiff in Error. E. C. Chapin, Att'y of Record. Business Address, Lansing, Michigan.
683, 20648, Ap'l 4, '07.

43 [Endorsed:] File No. 20,648. Supreme Court U. S. October Term, 1906. Term No. 683. Albert H. Rusch, Pl'ff in Error, *vs.* Jno. Duncan Land and Mining Co. Assignment of Errors. Filed April 6th, 1907.

Endorsed on cover: File No. 20,648. Michigan supreme court. Term No. 270. Albert H. Rusch, plaintiff in error, *vs.* John Duncan Land and Mining Company. Filed March 30th, 1907. File No. 20,648.

UNITED STATES SUPREME COURT.

OCTOBER TERM.

No. 270.

ALBERT H. RUSCH,
Plaintiff in Error,

vs.

JOHN DUNCAN LAND & MINING COMPANY.
Defendant.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

Patrick A. O'Donald, Charles S. Draper and Henry Gamble were the grantees under the last recorded deeds in the regular chain of titles, and James B. Peters was the grantee under the last recorded tax title, to the N. ½, Section 12, T. 47 N., R. 42 W., Gogebic county, Michigan prior to the sale to the state for delinquent taxes of the 13 consecutive years, 1889-1901. Unpaid taxes on these lands for the said 13 years were returned delinquent to the state and sold to the state. On July 3, 1902, plaintiff in error made application for purchase of tax deeds to said lands, and in 1902 and 1903, received state tax deeds conveying the lands as follows: For the taxes of 1889 he received a separate deed for each 160 acres. For the taxes of the two years, 1890 and 1899, he received a separate deed for each 40 acres. For the taxes for the four years, 1895-6-7-8, for one consideration one deed conveyed five forty-acre descriptions, viz., NE of NE, NW of NE, SW of NE, SE of NE, and NE of NW, and for the same period of four years, 1895-6-7-8, one deed conveyed four forty-acre descriptions, viz., NW of NW, SW of NW, SE of NW, in Sec. 12, and SE of NW in Sec. 18, T. 47 N., R. 42 W. Tax receipts for the remaining of the 13 years were obtained as a condition of purchase as required by law.

Stipulation, Record pp. 12, Subd. 19.

On Oct. 30, 1902, Jas. G. Gibson, sheriff of Alger county, Michigan, served upon Henry Gamble a tax notice, one of the owners of

the lands then living in Alger county. On Oct. 21, 1902, Henry A. Newton, sheriff of Saginaw county, served tax notices upon Mrs. Sarah T. Draper, wife of Chas. S. Draper, deceased, and sole legatee, and upon James B. Peters and Patrick A. O'Donald. Proofs of the service of the tax notices were filed with the county clerk of Gogebic county, as required by law, and subsequent to a period later than six months from the date of filing of returns, the John Duncan Land & Mining Company, a Michigan corporation, doing business at Escanaba, Michigan, acquired quit claims from Patrick A. O'Donald, Sarah T. Draper and James B. Peters, and filed a bill of complaint, alleging defective tax notices and setting up their right to buy the interest of defendant Rusch in all said lands, now plaintiff in error. The circuit judge held the notice to be correct and found title in defendant Rusch, and this on appeal was reversed by the Supreme Court of Michigan, upon the only ground that the tax notice should have itemized the amounts against each description of land. The answer to said bill of complaint set up that defendant Rusch had perfect title to said lands in fee, and that the provisions of the law under which the said complainant, the John Duncan Land & Mining Company, as assignee of all but one of former owners subsequent to purchase by plaintiff in error, claimed the right to buy back at a certain price within a certain time was contrary to certain provisions of the constitution of the State of Michigan, and also contrary to the 14th amendment to the constitution of the United States.

Defendant's Answer, Record P. 7, Subd. 14.

The Supreme Court of the State of Michigan dismissed the constitutional objections of your defendant with the statement that defendant was not in a position to complain of the provisions of his deeds.

The case is before you on these contentions.

ASSIGNMENTS OF ERROR.

Plaintiff in error, Rusch, makes the following assignments of error:

1. That the Supreme Court erred in refusing to consider the constitutionality of Act 229, Public Acts of 1897 of Michigan.
2. That the Supreme Court erred in deciding that whoever accepts a deed is not in a position to complain of its provisions.
3. That the Supreme Court erred in its opinion and deprived plaintiff in error of his property without due process of law.
4. That the Supreme Court erred in not holding that said Act 229 was contrary to the provisions of the 14th amendment to the Constitution of the United States, for the reasons that said Act 229 deprives persons of their property without due process of law, and denies to all within its jurisdictions, the equal protection of the laws, and restrains the freedom of contract.

5. That the law is class legislation.
6. That Act 229 is contrary to public policy.
7. That the Supreme Court erred in not holding that defendant Rusch was the holder to the fee interest in said lands.

MICHIGAN TAX LAW.

To show the nature of the title which a tax purchaser obtains by his tax deeds, a brief resume of the Michigan Tax Law is here inserted. (The references are to Compiled Laws of 1897, and Public Acts since).

On the third Monday in May in each year, the supervisors are to complete their assessment rolls, P. A. 262, 1899. The following Tuesday and Wednesday the Boards of Review are to meet, examine the roll and make corrections,—3852. And on the following Monday and Tuesday, they meet to consider objections, and make such corrections as are equitable,—3853. The tax roll is made up by the supervisors and placed in the hands of the township treasurers for collection in December—3867. During the month of December and until January 10 following, all taxpayers, who are charged to know that their lands will be assessed, and to know when and where taxes are payable, and are charged to know that if taxes are not paid penalties and forfeitures are thereby incurred and property will be **sold.**

State Tax Law Cases, 54 Mich. 350.
Muirhead vs. Sands, 111 Mich. 487.
Aud. Gen. vs. Sparrow, 116 Mich. 589.
Dumphey vs. Hilton, 121 Mich. 317.
Cole vs. Shelp, 98 Mich. 56.

have the right to pay taxes,—3867. The treasurers are required to call personally upon taxpayers and demand payment after January 10,—3869. The treasurer **shall** then proceed to seize personal property to satisfy tax liens, 215, P. A. 1899. Taxpayer may pay portions or pay under protest and sue to recover,—130 P. A. 1901. Delinquent lists of unpaid taxes are returned to the county treasurer about the first of March,—Act 193, 1901, and 3878. Taxpayers have still another chance to pay,—262, P. A. 1899, and this right continues until lands are sold, which period will appear later. Lands which are delinquent upon the books of the Auditor General, to whom returns are made of such delinquent lists by the county treasurers about May 1, for a period of one year or more, shall be subject to sale to satisfy the tax liens,—3883. Thus we see that unpaid taxes for 1904, and returned to Auditor General in 1905, remain on the books a full year and are offered in 1907, during which time the taxpayer can pay his tax. A full legal proceeding for sale of delinquent tax lands is begun by the filing of a petition, which "shall be deemed equivalent to a bill in chancery." — 262 P. A. 1899. The petition sets forth that "the sale shall be made

to the person paying the full amount charged against such parcel, and accepting a conveyance of the smallest undivided FEE SIMPLE interest therein." Publication is made of the petition,—3886, and county treasurer is to notify taxpayers,—234 P. A. 1905.. Publication of delinquent lists continue for four weeks,—264, 1899. The hearing upon the petition is had. It will be noted right here that the owner's title and his right to possession is involved in this hearing,—Ball vs. Ridge Copper Co., 118 Mich. 13. A decree is taken in favor of the state and a public auction sale is ordered,—262 P. A. 1899. The sale is conducted by the county treasurer,—262 P. A. 1899, and the purchaser accepts "a conveyance of the smallest undivided fee simple interest therein." The section also provides that no sale shall be set aside except where the property was exempt or the taxes paid, yet the purchaser does not get his deed, only a certificate stating that a deed will be issued after one year if original owner has not redeemed within the time provided in C. L. 3897, amended by 262 of 1899. All lands not bid in by individuals shall be considered as bid in by the state for the full amount of tax and are open to purchase by anyone to the Auditor General. The title which the state gets is set forth in the law and confirmed by recent opinions: **'It is settled as between state and the original owner the title to lands sold for the non-payment of taxes becomes absolute in the ~~sale~~ on a regular sale.'**

Hickey vs. Rutledge, 136 Mich. 128.
Robbins vs. Barron, 32 Mich. 36.
Ct. M. L. Ins. Co. vs. Wood, 115 Mich. 444.
Monahan vs. Aud. Gen., 136 Mich. 247.

A tax purchaser makes application to the Auditor General to buy titles and receives a deed as set forth in the Record on pages 12 and 13, which conveys a title which the legislature attempted to make as strong as possible. In 3895, the law says such deed "shall convey an absolute title to the land sold, and be conclusive evidence of title in fee, in the grantee," subject to only subsequent taxes, and in Sec. 84, Act 262, P. A. 1899, the law provides that, "Upon making payment as above, such purchaser shall be entitled to and receive a certificate, and a deed conveying **all** the right, title and interest of the state to such tax lands acquired or accrued by virtue of original sale or sales to the state." And such a deed is sufficient to pass title.

Dawson vs. Peters, 119 Mich. 274.
Mann vs. Carson, 120 Mich. 631.

Under the provisions of Sec. 74, Act 262 of 1899, a delinquent taxpayer has the right to "redeem" for a period of one year from the sale by the county treasurer, under the decree of the court. The tax purchaser in the meantime can acquire no perfect title,

and gets no deed. A year from the time of sale by the county treasurer the tax purchaser who may have obtained a certificate of state tax sale bid can obtain a deed as set forth in the record, or any person may purchase a tax deed providing the land was not bid in at the said county treasurer's sale. The tax deeds which such tax purchasers get are mostly uniform and recite a quit-claim to such purchaser, his heirs, etc., and further that he obtains all the rights which acquired or accrued to the state by virtue of the original sale or sales to the state.

Provided that said deed is subject to the relevant conditions imposed by Act 229, P. A. 1897. The deed does not recite any conditions of the act, but simply states that it is subject to the relevant conditions imposed.

Act 229, of 1897, was made a law purporting to amend the general tax law, which is Act 206 P. A. 1893, by adding four new sections. Section 1 provides that before a tax purchaser who, having obtained deed and title, shall be entitled to simply possession, he shall serve a certain tax notice therein set forth, in which such tax purchaser shall offer to convey to such person or persons, therein designated, his title for a certain consideration within a prescribed time. Sec. 2 provides that certain stated persons shall have a right to receive by conveyance the interest of said tax purchaser. Sections 2 and 3 are limitations.

The law does not require the Auditor General to insert that condition that the deed is subject to the relevant conditions imposed by said Act 229. The provisions of said act 229 do not deny title in the tax purchaser; the right to possession being merely deferred. The case is before you as if no tax notice was served. Complainant company does not claim that the parties upon whom service of notice was attempted were not the proper parties within the meaning of the law at the time service was attempted. Hence their right to a conveyance for plaintiff in error arises from a construction of the law. It is claimed that Act 229 could not create a vested right in a former party after decree and sale, hence title was not assignable to complainant company, a point which will be discussed later.

QUESTIONS INVOLVED.

Two questions are involved in the case, viz., 1. Is the plaintiff in error estopped from contesting the question, and 2. Is act 229 constitutional?

ARGUMENT.

Doctrine of estoppel cannot be invoked against the plaintiff in error.

From the above it is manifest that under the statute the proceeding is an action in chancery, and the decisions of our court that the state gets an absolute title to all lands sold upon hearing

of the Auditor General's petition, and from a consideration of the provisions of Sec. 3895, C. L. 1895, and of Sec. 84, Act 262, P. A. 1899, the tax purchaser gets all the title which the state has acquired or has accrued to it. The provisions of act 229 do not deny this and so must be construed as to confirm that title conveyed.

After the collection of taxes has passed out of the township or local treasurers, as to then who becomes the owner the state does not concern itself. Simply the description of property, and the detailed statement of taxes assessed against each description, concerns the state. After a tax purchaser has applied for a deed and obtained it, and paid the consideration required, the lien of the public for the taxes is completely satisfied, and cloud removed. The state is no longer concerned with the obligation discharged by such purchase and payment. It should also be considered that for one year following the sale upon decree, that the state is the absolute owner of the property, but does not issue a deed because of the indulgence which is granted to the former owner and others to come and pay and get their property back.

The tax deed under which plaintiff in error obtained a title recites, Record P. 13, "That whereas in pursuance of the provisions of law," plaintiff in error "became the purchaser of the rights of the state in and to the following described lands," and that said plaintiff in error has paid the state treasurer upon a proper certificate issued, a certain sum, "being the amount of purchase money therefore, as provided by law," and that the Deputy Auditor General in pursuance of law in him vested "in consideration of the premises, and the payment of the purchase money above mentioned," receipt of which is acknowledged, does "remise, release and quitclaim unto said" plaintiff in error, "and to his heirs and assigns forever, all the rights acquired by the state in virtue of the original sale or sales to the state in the premises above described, subject to all taxes assessed and levied on said lands subsequent to the taxes for which said land was bid off in the name of the state."

"Provided, However, That this indenture is subject to the relevant conditions imposed by Act 229 of the Public Acts of 1897, as amended."

Such a deed vests grantor's entire title in grantee. (13 Cyc. 655).

It is apparent that a fee simple state is conveyed by the deed and under the provisions of the law, and that the condition (which is not set forth at length, or in any way indicating the nature of the conditions) is of a peculiar nature, resting upon a law which, while not denying a good estate in fee in the grantee, as stated in the recitals, is yet repugnant to the estate, and illegal, indefinite and uncertain, and unconstitutional.

That grantee is not estopped from contesting or resisting the enforcement of conditions in a deed is well established.

2 Herman Estoppel and Res. Adj. 723, cases cited.
Bradley vs. Peixoto, 3 Ves. Jr. 323.
4 Green. Cruise Title 32, Ch. 12, Sec. 26, N. 1.

3 Kerr Real Property, 1859.
Baulos vs. Ash, 19 Ill. 187.
Coke Lit. 223 N. and 352 N.
Hafner vs. Irwin, 20 N. C. 433.
Mowry vs. Bradley, 11 R. I. 370.
Adams vs. Dinklee, 19 Vt. 282.
2 Cooley Bl. 298.
Jacobs vs. Miller, 50 Mich. 119.
Mandelbaum vs. McDonnell, 29 Mich. 78.
2 Whart. Ev. 1050-4.
Logan vs. Miller, 76 N. W. 1005.
Wallace Lesee vs. Miner, 6 Ohio (6 Han.) 366.
Sparrow vs. Kingman, 1 N. Y. (1 Comst.) 242.
Kingman vs. Sparrow, 11 Barb. 201.
Tefft vs. Munson, 63 Barb. 31.
Lytle vs. Beveridge, 50 N. Y. 592.
Bigelow vs. Finch, 11 Barb. 498.

In 6 Am. & Eng. Ency. of Law 506, "Where the condition is illegal, indefinite or uncertain, unreasonable, or repugnant to the nature of the estate to which it is annexed, it is void, rendering the grantee's estate absolute." To the same effect is 13 Cyclopediae of Law and Proceedure 619 and 686, and cases cited.

Void conditions in a deed do not estop. (Dun vs. Wymen, 51 L. J. Q. B. 623).

Conditions tending to depreciate the interests conveyed are void.

Riddle et al. vs. Charlestown, et al., 43 W. Va. 796.

In Jones vs. Engine Co., 171 Ill. 507, it was held that a restriction against alienation for a limited time is void as repugnant to the estate. If a deed is executed in contravention of law, estoppel does not apply. Merriam vs. Boston, R. 117 Mass. 241. But estoppels may arise from parts which are good. U. S. vs. Hodson, 10 Wall. 395 and 102 U. S. 420.

A condition in a deed for the benefit of a stranger is void, 13 Cyc. 685. Ep. Young, 11 R. I. 636.

One who does not sufficiently appear entitled to the benefit of a condition cannot take advantage. Hayes vs. St. P. M. E. Chr. 196 Ill. 633.

In Dennison vs. Taylor, 15 Abb. N. Cases N. Y. 439-441, it was held, "He who conveys the absolute fee of real estate to another cannot retain the right to its purchase price when subsequently sold," citing the leading case of De Peyster vs. Michael, 6 N. Y. 467. If grantor cannot return part of purchase price, how can he name the price and designate the party and time within which a conveyance is to be made.

In Cooley Const. Lim., 7th Ed. 259, upon unconstitutional legislation, he says, "Rights cannot be built up under it. Contracts

which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it."

The case is before you as if no tax notice was served. The validity of the tax proceedings are not questioned. They are admitted. The tax deeds having been introduced are evidence of a legal claim to the property.

Case vs. Dean, 16 Mich. 12.
Lacey vs. Davis, 4 Mich. 140.
Amberg vs. Rogers, 9 Mich. 332.
Anderson vs. Besser, 131 Mich. 483.
Wright vs. Dunham, 13 Mich. 414.

Complainant company does not claim that the parties upon whom service of tax notice was attempted were not the proper parties within the meaning of the law. Hence complainant's right to a reconveyance from plaintiff in error arises on only just what legal rights he possesses. Act 229 could not create a vested right in a former party after decree and sale, and not creating vested rights in O'Donald, Draper, Gamble and Peters, they could not assign any rights.

The foregoing cases are only cited to show that conditions in deeds have been the subject of judicial inquiry, and that the intent of the deed or will is to be determined as is held in Tucker vs. Meeks, 2 Sweeny (N. Y.) 736.

In view of the above citations and numerous others, it is to the plaintiff in error a queer doctrine that holds that because grantee received deeds expressly subject to a condition that the condition was not subject to inquiry, but that grantee was bound by such conditions, no matter what they might be.

CONSTITUTIONALITY.

The other question for consideration is as to the constitutionality of the act No. 229 of 1897.

Sale by decree of court creates a new title.

Before the enactment of Act 229 in 1897, a tax deed was a good deed conveying a perfect title in the tax purchaser, providing the proceedings to foreclose the state's lien were regular. All previous titles are broken up. A new title is created.

Muirhead vs. Sands, 111 Mich. 487.
Lacey vs. Davis, 4 Mich. 140.
Van Auken vs. Monroe, 38 Mich. 725.
Sinclair vs. Larned, 51 Mich. 335.
Lacos vs. Wadsworth, 56 Mich. 421.
Westbrook vs. Miller, 64 Mich. 129.
Robbins vs. Barron, 32 Mich. 36.
Horton vs. Helmholtz, 14 Det. Legal News, 422. 112 N.W. 4

Cooley on Tax, 3rd Ed., p. 960.
Emery vs. Ter. Co., 178 Mass., 172.

And the tax deed in the form stated is sufficient to pass title.

Mann vs. Carson, 120 Mich. 631.
Dawson vs. Peter, 119 Mich. 294.
Sinclair vs. Larned, 51 Mich. 335.
Van Husan vs. Heames, 96 Mich. 509.
Boardman vs. Boozennickel, 121 Mich. 320.
Ct. Mut L. Ins. Co. vs. Wood, 115 Mich. 444.

And an absolute and perfect title is vested in the state, upon the hearing of the Auditor General's petition. And the title is foreclosed by a good decree.

Ball vs. Ridge Copper Co., 118 Mich. 7.
Griffin v Kennedy 148 " 685 -

The title is absolute in the state, subject to what rights the holder of a certificate of state tax sale might have.

Hickey vs. Rutledge, 136 Mich. 128.
Robbins vs. Barron, 32 Mich. 36.
Ct. M. L. Ins. Co. vs. Wood, 115 Mich. 444.
Monahan vs. Aud. Gen., 136 Mich. 247.

The state or the holder of the certificate may have a lien for improvements.

Sec. 3927, C. L. 1897.
Boucher vs. Trembley, 140 Mich. 327.

and an injunction to prevent waste, and action for trespass.

Sec. 3938, C. L. 1897.
Davies vs. Frankenlust Twp., 118 Mich. 494.
Hall vs. Nester, 122 Mich. 141.

Had the legislature intended that the tax deed should not convey an estate in fee simple, it would not have declared that in case of mortgages "such conveyance shall not operate as an **absolute conveyance of the title** to such lands, but shall be considered and treated as an additional lien upon such lands," and enforceable with the terms of the mortgage. Act 204 of 1899.

The tax deed conveys the fee.

Toolan vs. Longyear, 144 Mich. 55.

In Richardson Lumber Co. vs. Jasspon, 145 Mich. 11, in speaking of the tax notice and rights under it, the court said: "It is a FAVOR granted to him after he has been divested of his title, by which his title may be restored to him." * * * * P. 12, further, "This language is consistent with the theory that the title has passed out of the original owner into the owner of the tax title, and that the former is entitled, in the language of the statute, to a reconveyance." **This language cannot be reconciled with.**

Adken vs. Pillen, 136 Mich. 684.

Act No. 229 does in no way deny a good and valid title in the tax purchaser or that conveyed by the terms of the deed and the provision of Section 3895 and Section 3907, as amended by Act 262 of 1899. The aim of the act is to reinvest, by legislative enactment, an equitable right, which it has absolutely destroyed by judicial proceedings, to force a tax purchaser to sell a title vested in him by terms of the deed itself to one of several parties for a certain sum within a prescribed time. The legislature cannot make a contract between individuals.

The theory that a foreclosure of the state's lien for taxes by taking decree vests absolute title in the state is further sustained by Sec. 3949, C. L. 1897, as amended by Act 154 of 1895 and Act 107 of 1899, that where lands are delinquent for taxes for five years or more and have been sold to the state, that such lands shall be deemed abandoned lands and the state's title shall be deemed absolute. That section and the following section provides how such lands shall be inspected and deeded to the State Land Commissioner and sold at auction sale at the highest price, but not less than the appraised value. This is ex parte proceeding. The original owner has no rights extended or secured to him that he did not have while the lands were open for purchase from the Auditor General. In fact, such proceeding lessens his rights, in that a purchaser from the Land Commissioner does not have to serve a tax notice required by the law in question; neither does the state. Thus a purchaser of lands held for a period of 13 years, as were the lands in question, from the Auditor General does not acquire a good and valid title as he would if he had purchased those same lands from the Land Commissioner.

Cooley Const. Lim., 6th Ed. 329:

"A law annulling conveyances between individuals and declaring that the grantors shall stand seized of their former estates, notwithstanding these grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances."

Cooley Const. Lim., 6th Ed., pp. 108-9.

"It (Legislative Department) cannot directly reach the property

or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgments in the courts

Newland vs. Marsh, 19 Ill., 383.

for to do so would be the exercise of a power which belongs to another branch of government, and is forbidden to the legislature."

Benson vs. City of New York, 10 Barb. 223.

Cooley's Blackstone, Comm., 3rd Ed., P. 138 N.:
"It is well settled that government has no power to take the property of one citizen and transfer it to another, even on the making of full compensation," and cases cited:

Beekman vs. S. & S. R. R. Co., 3 Paige 45.
Hepburn's Case, 3 Bland 95.
Pittsburg vs. Scott, 1 Penna. St. 309.
Matter of Albany St., 11 Wend. 149.
Cooper vs. Williams, 5 Ohio 392.
Reeves vs. Treas. Wood Co., 8 O. St. 333.
Nesbit vs. Trumbo, 39 Ill. 110.
Osborn vs. Hart, 24 Wis. 90.
Bankhead vs. Brown, 25 Iowa 540.

The proceedings which are necessary under the provisions of Act 229 are these: After making application for the deed and which usually takes a month or more, the tax purchaser receives his deed, if there are no previous applications. He must then obtain from the abstractor of the county in which the lands lie an abstract of titles, and serve a good notice upon the person (whoever he may be) who happens to be the grantee under the last recorded deed, tax deeds and all undischarged mortgages or heirs of each, in the regular chain of titles to said lands. Good faith is required to be used here,

Winters vs. Cook, 140 Mich. 483.

and this sometimes consumes many months because of the indefiniteness of the records, the changes of residence which people have made, deaths and location of heirs during a period of 10 or more years when taxes have remained unpaid and have been returned, in case of absence, which is generally the case, the sheriff makes the service by mail, and then the return of the sheriff must be filed with the county clerk, from which time the six months' period begins to run. Substituted service is provided for.

Pike vs. Richardson, 136 Mich. 414.

The amount which the tax purchaser must pay to the county clerk to file the tax notice with proof of service is $0.25 (Sec. 142a-142, 1895), yet no provision is made in the law for the "original owner" to pay this sum. What he has to pay is simply the original investment; 100 per cent thereof, $5.00 for each description, and the cost of the service by the sheriff or by substitution of the notice; not the filing with the county clerk.

In the consideration of this question it should also be noted that any person may purchase tax lands held by the state at any time during the year except when the county treasurer's sale is on,

Sec. 84, Act 262, of 1899,

by paying the full amount as bid to the state, and all delinquent taxes returned to the state subsequent to the sale by the county treasurer. An application to purchase state's title to tax lands may be made in January, deed would probably be issued some time in February. The taxes which were assessed against the land and became a lien on the first day of the previous December (3836), have not been returned to the Auditor General's office. They are a lien, however, and if the tax purchaser wants to avoid their being returned and the land sold, and avoid the heavy interest and heavy penalties, he must pay those taxes at once. YET FOR THEM HE CAN HAVE NO RECOVERY from the original owner,

Croskey vs. Busch, 116 Mich. 288.
Corrigan vs. Hinkley, 125 Mich. 125.

yet he is obliged to search the records, serve a notice and give the original owner and others a chance to buy back for six months after the tax notice is filed. In cities where summer taxes become a lien in July, a further amount is required to be paid by him for which such tax purchaser can have no recovery,

Cheever vs. Flint Land Co., 134 Mich. 604.

and before such tax purchaser can have his deed recorded he must show certificate of payment of all taxes. Act 154, 1895.

A tax title purchaser knowing that he could obtain a perfect title or knowing that his title was perfect at the time the deed was issued would pay all taxes within the time allowed for payment of the same, and thus avoid paying expenses and heavy interest charges, (Act 262, P. A. 1899) which accrue on returned descriptions, but thinking that his title is liable to be divested at any time within six months after a tax notice is served upon a former owner, former tax purchaser, mortgagee, etc., would not pay those taxes knowing that he could not recover for them, and in any event he is out all taxes paid subsequent to his purchase or he is out costs

of collection and heavy interest charges and for which the law makes no provision of recovery to him.

After Jan. 10, a collection fee of 4 per cent is added,—3867, and after March 1, 1 per cent per month, and $1.00 additional,—3882.

The parties who are supposed to be entitled to a conveyance of the tax purchasers' interest are "Any grantee or grantees under the last recorded deed in the regular chain of title or under tax deeds to such lands, or any mortgage or mortgages named in all undischarged mortgages, or assignee thereof of record at the time of giving of said notice," and if party of record is dead, then notice must be served upon heirs. Nothing is said about priority of rights to the first conveyance from the last tax purchaser.

While it has never been adjudicated, it is assumed (but not admitted), in this argument, that only the grantee under the last recorded tax deed is entitled to a reconveyance, as notice is required to be served on him only. Sec. 1, Act 229. The phraseology of Sec. 2, Act 229, however, admits of no construction other than a grantee under a recorded tax deed. Such a construction would be a serious disturbance of vested rights, as a very early tax deed purchaser could acquire title from the very latest tax purchaser and thus defeat a number of tax titles held subsequently to him as well as the original owner. Whatever is urged against this law can be urged with much more force if a grantee under any tax deed could acquire title.

Act 229 does not create a vested right in former owner.

It is plain that this law cannot reinvest a title or equitable interest in the title to the lands, the title to which has been destroyed by judicial proceedings, but it simply attempts to give a bare, naked right, which may be destroyed or extended at the will of the legislature. It is therefore not a vested right.

League vs. Texas, 184 U. S. 158.

In all conveyances from the tax purchasers to former owners, etc., the wife must join, for the land is one in which she can take dower.

Where the statute provides that the net proceeds from auction sale of forfeited tax lands could be recovered in a suitable action by a former owner of the property, held that it was "in no sense the recognition of a pre-existing right to, or claim upon the lands or its proceeds," but a mere gratuity, a "favor" as held in Richardson vs. Jaspon, 145 Mich. 11.

McClure vs. Maitland, 24 W. Va. 580.
Waggoner vs. Wolf, 28 W. Va. 820.
Rich vs. Braxton, 145 U. S. 401.

The law very carefully limits the right to a "reconveyance" to certain parties, and this must be held to be "exclusively to the owner

of the land when it was sold, to guard the tax purchaser from the officiousness of strangers."

Orr vs. Cunningham, 4 Watts & S. 298.

Any person claiming the benefits under the law in question, must have a valid subsisting right or claim in and to the land at the time his title was litigated.

Rogers vs. Butler, 77 Mass. 410.
Woodward vs. Campbell, 39 Ark. 580.
Rich vs. Palmer, 7 Ore. 133.

And no rights could be obtained by virtue of a conveyance made by the owner subsequent to the time the decree was taken against the land for the tax lien. Only the person or his heirs owning the land at the time the decree was taken against the land can claim any rights under the act.

2 Am. & Eng. Ency. of Law, 1026.
Ely vs. Land Commrs. 49 Mich. 17.

COLLUSION MAY DEFEAT THE INTENDED BENEFITS OF THE LAW.—DUE PROCESS OF LAW.

With the foregoing propositions in view, there are conditions arising and likely to arise at any time, which would defeat the beneficial purposes of the act, and enable a party to obtain a good title by virtue of a mere scintilla of claim which may have lain dormant for 50 years.

In the upper peninsula lands have been returned delinquent and sold for taxes almost from the date of their location. Counsel knows of descriptions which were located 50 years ago and sold every year for taxes since. Under this law the person locating these lands can acquire title, which would wholly destroy any one person's title, which may rest upon tax titles purchased for 50 years, and likewise a tax purchaser for a single year can get a title which destroys the original owner, who may have paid all other taxes. There may be one or more claimants under tax deeds for a period of many years. Before 1897 a tax deed conveyed a good title in fee simple, if the proceedings were regular, but after 1897, Act 229, the law in question, compelled a tax purchaser to serve tax notices upon the former fee owner and the grantee in recorded tax deed, and to convey to such person if deposit was made. In the case at bar there existed O'Donald, Draper, and Gamble, "fee owners," and Peters, "former tax title holder." Peters' title was acquired previous to 1889. (See

statement of facts). Peters' title to the land is good, if the proceedings were regular, absolutely shutting off all titles of O'Donald, Draper and Gamble. Yet this law revives, if valid, certain rights, which were destroyed for many years. Had O'Donald, Draper and Gamble purchased conveyances from Rusch, would Peters' title have been wholly destroyed? Had Peters purchased Rusch's title, would he be compelled to reconvey certain or all interests to the so-called fee owners? Suppose the tax notice had been served on only one of the fee owners, that fee owner would have been compelled to serve a tax notice upon the others and convey to them, if they wanted it, or to any one of them, and his title would have to be conveyed away. The same analysis is true as to a number of heirs. Suppose only one heir of the fee owners had insisted on a reconveyance, is the whole title absolute in him, cutting off all the other parties and their heirs? Suppose one of a number of heirs of Gamble had repurchased Rusch's title, such a repurchase would vest in all the heirs of the other three fee owners a title and give the one paying only an unenforceable lien upon the land for such payment, if the law is valid. Under the present case a conveyance by Rusch to defendant company inures a title for the benefit of Gamble, a former fee owner, as well as himself, defendant in error not having purchased Gamble's title. See Record, p. 11.

A previous tax title purchaser may have foreclosed other titles in bill for that purpose, yet under this law the right to a former owner of the fee to purchase a good and valid title from a tax purchaser since 1897 (where deeree was not recorded), and thus cut off the best title is apparent. Collusion by parties under proceedings in this law can defeat any benefits which the legislature might have intended. And it can be done. The tax title purchaser subsequent to 1897, is not obliged to convey to the party who offers first to buy back under the provisions of that law. He can convey to whatever interest he wishes to.

Let us consider a case arising entirely since 1897, when this law went into effect. There is present in the records a former so-called "fee owner" of years back who cannot be found, and a last recorded tax deed for taxes of 1900, and a still later one of 1901. We will assume that the 1900 owner has served a tax notice, the holder of the 1901 must also serve a tax notice upon the so-called "fee owners," and if those so-called fee owners who did not repurchase 1900's title, get in first and buy 1901 title, 1900 is [illegible] off and is no good, but assume that 1901 did not serve a tax notice upon 1900 holder, then the fee owners having purchased 1901's title must serve upon 1900 and convey an absolute title if 1900 insists upon a conveyance. And this must be true if law is valid. We will assume that the 1901 holder served upon 1900 holder personally and by publication upon the others,—so-called fee owners. The six months limitation can be made to run sooner against the tax holder than against the so-called fee owner. Assume the holder of the 1901 title does not serve upon the so-called fee owners, and 1900 holder obtains a conveyance of 1901 title. He must then serve upon the so-called fee owners and convey an absolute title to them if the authority in Adkin vs. Pillen, 136 Mich. 684 is correct.

But if the 1901 holder serves both notices, it then depends upon whoever gets his proper demand to redeem to 1901 first as to who gets an absolute and perfect title.

Another instance of the unequal protection afforded by this law is found in the fact that an owner might execute a timber contract, limiting removal of timber to five, ten or any period of years, and impose the obligation of paying taxes during removal of timber to the vendee under the timber contract, and the vendee, as is the custom, ignores to pay taxes, the land is sold and is afterward bought on a tax deed, the owner has the right to a reconveyance from the grantee under the tax deed, but not the vendee under the timber contract. The owner can repurchase and may sue in trespass for the recovery of an amount not which he paid to regain his title being the taxes and penalty, but only the amount of the taxes.

Assuming that the notice served upon the former tax title holder was a fatally defective notice, but that served upon the fee owner is a valid one, and the tax title holder obtains a reconveyance according to the statutory requirements, must he serve a correct notice upon the fee owner, or is his estate absolute. If he is required to do so, a title is required to be conveyed away which was good and required of no default of his own. Most plainly a deprivation of property without due process of law, nor is this an equal protection of the law.

Again several parties might have agreed upon a partition of lands held as one, but the entire might be assessed and sold as one parcel. One wishing a tax purchaser's reconveyance must pay the statutory amount on the whole. He has no other option because the questions as to the regularity of the assessment are foreclosed by decree.

Ball vs. Ridge Copper Co., 118 Mich. 7.
Muirhead vs. Sands, 111 Mich. 487.

Many conditions can arise under this law which might give rise to endless litigation, and it is desirable to touch perhaps on one other. The last tax purchaser instead of serving any notice acquires the interest by quit claim of the fee owner. Does he then acquire title, or does he have to serve a notice and convey to the last preceding tax title holder? And under holding in Adkin vs. Pillen, 136 Mich. 684; Huron Land Co. vs. Robarge, 128 Mich. 686; Boucher vs. Trembley, 140 Mich. 327; Sanborn Co. vs. Johnson, 148 Mich. 405, and Flint Land Co. vs. G. R. & I Ry., 147 Mich. 627, when compared with the fact that the decree forecloses title, and that title is required to be conveyed by statute, Act 262 of 1899, it is no wonder that the legal profession of our state is somewhat at sea as to just what title a tax deed conveys.

In Flint Land Co. vs. G. R. & I. R. R., 147 Mich. 627, and Sanborn Co. vs. Johnson, 148 Mich. 405, it was held that even after tax notices were duly served, tax deed grantee could not obtain possession by application of writs of assistance, such a "proceeding" being not such a one as is required as stated in the tax notice.

for the possession of the land. The proceedings then being necessary are such as bill to quiet title, or ejectment, when the regularity of the tax proceedings is again put in question, which if contested and found faulty, tax purchaser is deprived of not only the penalty prescribed by the tax notice, but his title, and is reimbursed only to the extent of amount paid for tax purchase and not any taxes paid subsequently to such application and purchase, nor expenses of service of tax notices. In Beck vs. Finn, 122 Mich. 21, it has been held that tax purchaser may gain possession by writs of assistance and that he need not necessarily resort to an action at law. Under the law and construction placed upon this act by our court, we have all legal and equitable titles destroyed by a judicial proceeding, a purchaser for a good and valuable consideration invested with a title, who upon payment of the amount of his purchase and penalty is compelled (if demanded) to convey his title to one of several persons whose interests may have been wholly dead for years, and not having a scintilla of a claim, then requiring that tax purchaser to proceed in a legal proceeding in which all such "interests" must have the opportunity to come in and defend and attack if possible the original tax proceedings, and taking away from that tax purchaser, any right he may have to the penalty profit of his tax purchase. Such requirements play havoc with the stability of property rights, and must excite mirth in the minds of those who like to see simplicity in the civil jurisprudence of our country.

ESTATES LESS THAN FEE CAN BE MADE FEE ESTATES.

An illustration of the viciousness of this law and the encouragement and protection which it gives owners of estates less than fee to let their taxes lapse and buy a fee title from a tax purchaser is found in this law. For instance, the owner of a life estate can acquire no tax deed himself, but he has the privilege of buying a fee title from a tax purchaser under the provisions of this act by paying the penalty. The remainder man has no privilege to buy the fee title of the tax purchaser, as this act does not extend the right to him. Under the law as it is amended, an occupant, "person in actual possession of the land,"—Act 142 of 1905, can defeat the owner, for the law does not state that the conveyance from the tax purchaser shall not operate as a conveyance of the fee as in mortgages, and does convey the fee title. (Richardson Lumber Co. vs Jasspon, 145 Mich. 11). This law openly provides a means whereby a grantee's express conditions can be defeated to the damage of the remainder man or even the owner. Such is manifestly and grossly contrary to public policy, and is an unequal protection of the law—a deprivation of property without due process of law.

Through the operation of this law, reservations of mineral rights or water privileges, can be defeated in favor of the holder against whom such rights are reserved.

LONG TERM MORTGAGES.

By keeping interest payments up a mortgagor might, in a rapidly growing city where special assessments are exceedingly high, force a mortgage on a long term mortgage to obtain an investment which would greatly exceed the value of the property and make to him an actual loss.

MECHANIC AND JUDGMENT LIEN HOLDERS.

The Act 229 under consideration makes no provision for redemption by mechanic or judgment lien holders or parties in attachment proceedings, to protect their rights during pendency of proceedings. A tax lien is superior to all other liens (3863). A bidder who has acquired a certificate by sheriff's execution sale does not acquire the deed until one year after sale during which time the original owner has a right to redeem by depositing redemption money with the Register of Deeds. Assume that there are several years taxes standing against this land for some years open to purchase by tax deeds. During the year following the sheriff's sale, any person can obtain those tax deeds. If the owner buys the tax deeds, does the purchase inure to the benefit of the execution sale purchaser? And if the execution sale purchaser buys the tax deeds, does he get an aditional title, or does it amount to the payment of a tax? The owner could come in and redeem from the execution sale and the execution sale purchaser would be out the amount paid for tax deeds which would seem consistent with the holding in Adkin v. Pillen, Supra. And if another party purchases tax deeds, he must serve notice upon the owner but not upon the judgment lien holder. Six months may elapse within the year allowed redemption from execution sale, and there is no protection. The rights which a suitor has in lands which he has attached may be swept away and he is powerless to protect himself. Only the former owner, last preceding tax holder, mortgagee are entitled to the benefits of this law.

PERSONAL PROPERTY.

Act 229 applies only to real estate. Personal property enjoys no such privileges. When personal property is sold, the title goes with it, and it may be sold for taxes on real property (3878). The merchant with his stock in trade, the manufacturer with fixtures, easements and appliances enjoys no such privileges. The objection is that the law relative to taxation of personal property does not affect fundamental rights and is not mere classification. The constitution and the law provides for the taxation of all property at its cash value, all property is subject to the same rate of taxation, payable at the same time, and under the same conditions, but the fundamental rights and privileges are different. Real property is enhanced by the value to which it is used, to the personal property upon it, yet

it is made to suffer for privileges which the reality to which it is attached enjoys. The 14th amendment does not divide property, saying that no person shall be deprived of his property without due process of law, a merchant's stock of goods and a manufacturer's machinery is property to him in every sense which the amendment provides when brought within the conditions and embraced within the class to which it naturally relates.

Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. Rep. 186.
Palmer v. McMahon, 133 U. S. 669.

RAILROAD COMPANIES.

Railroad companies do not have the privileges granted by the act which is here attacked upon the grounds of its constitutionality. Non-payment of their taxes requires the state to foreclose its lien as in cases of judgments in courts of record. Sec. 7, Act 19, P. A. 1899; Sec. 13, Act 173, P. A. 1901; Sec. 13, Act 45, P. A. 1903; Sec. 14, Act 282, P. A. 1905. The term property of R R. Cos. shall include real personal and mixed by provisions of acts stated.

COMPANIES PAYING SPECIFIC TAXES.

Plank road companies and water power companies are among those who may elect to pay specific taxes in lieu of other taxes. Act 231, P. A. 1899. They can buy and sell real estate. 6802 C. L. 1897.

Thus a purchaser at a tax sale of railroad, plank road, water improvement property acquires a valid title after one year allowed sale of lands upon execution sale. (3998, 4025, 9179, C. L. 1897). Tax purchaser is required to serve no notice. There is no equal protection of the laws in that case. A tax purchaser acquiring tax deed to a forty is burdened with requirements which a tax purchaser to a railroad or water power forty is not burdened with, and comes within the rule laid down in Nashville et al. vs. Taylor, 86 Fed. 186.

INDEFINITENESS IN THE LAW AS TO PARTIES.

A very difficult problem and one which would be prolific of much litigation can very easily arise in attempting to determine the parties to whom the last tax purchaser is required to convey his title under the law in question. It is not difficult, however, where there is only a fee owner, as conveyance is required to be made to him or his assignees, but much difficulty can arise where there are several previous tax titles. The law requires notice and conveyance if demanded to be made to the grantee under a recorded tax deed. Assume that A, B and C have acquired independent previous tax

titles to a certain description which the last tax purchaser has since acquired by sale from the state. Assume that A's title is for taxes of 1900, B's for 1901 and C's for 1902. C gets his deed on record first and A last. A then is entitled to a tax notice and reconveyance if demanded, cutting off later titles. Assume that they are recorded in order of issuance, but A conveys his interest to D. D being assignee of A, whose title rested on a tax sale, becomes the last recorded tax deed grantee, and entitled to a reconveyance of the last tax purchaser's title.

Cooley, in his work on taxation, 3rd edition, p. 1025, states that whoever redeems, must bring himself within the law, thus placing the burden of all proceedings upon him who seeks to redeem. And on p. 1034, he states certain requirements upon the tax purchaser, yet the tax purchaser, according to Mr. Cooley, is not the holder of a deed conveying a fee and delivered, nor a deed of any kind, but the holder of a tax certificate, and the cases cited are found in those states in which the service of a tax notice is a condition precedent to the right to a deed. Wisconsin, Minnesota, Illinois, Iowa, Indiana, and other states make the serving of a notice a condition precedent to the issuance of a deed, and strict service is rightly held to. The New York law, from where the Michigan law was evidently copied, differs in the all important fact that New York does not foreclose its lien like the Michigan law does. A tax is declared a lien. A hearing and decree forecloses that lien, and all outstanding rights and titles are quieted. A deed which has for its basis only a lien transfers only that lien and must be foreclosed. In the case of Dubois vs. Hepburn, 10 Pet. 1, the tax deed had for its basis only a tax lien.

In case of Reed vs. Aud. Gen., 146 Mich. 208, where our Supreme Court held this law constitutional, order to show cause upon application for writ of mandamus was denied on the ground that whoever accepts a deed is not in a position to complain of its provisions, which was the point contended for, and the case before you was cited to sustain the opinion. That case is passed without further comment.

The law is not without its benefits, and where through inadvertence a tax for a single year has been unpaid on a home or farm constituting the sole possession which a man might have struggled and worked for, but in cases like the one now before you, where for 13 years the owners had wilfully neglected and abandoned their **wild and unoccupied lands,** during which period, financial depression rendered any sale impossible, and the plaintiff in error takes a chance which the law invites, which chance the law declares to be valid and sound, it is contrary to equity that an assignee could come in years after the tax purchaser had obtained his title and paid intervening taxes, and because of a technical defect, not prejudicial to his interests in any way for the detailed statement can be obtained from the Auditor General by certificate upon application therefor, (Sec. 2, of Act 229), force a conveyance from such tax purchaser. The lands in litigation are timber lands to the value of $5,000. Plaintiff in error purchased those lands in 1902 and has paid taxes since. During this time the value of tim-

ber lands has increased. While there was ostensibly only interest on the money invested at the time of the purchase, there is now a good marginal profit, constantly increasing. Who should be given the profit? The man who gets there first and purchases the title, which should not be destroyed by a mere "favor" granted strictly construed.

In view of the reasons herein urged, it is contended that the act is contrary to the 14th amendment of the U. S. Constitution, as depriving the tax purchaser of his property without due process of law, denying to all the equal protection of the laws, grossly contrary to public policy, that the freedom of contract is restrained, and is class legislation, and being void, no rights can be built upon it and no estoppel works.

E. C. CHAPIN,
Attorney of Record.

O. H. REED,
Attorney for Plaintiff in Error.

Supreme Court, U. S.
FILED
APR 27 1908
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM 1907

No. [redacted]53.

ALBERT H. RUSCH, Plaintiff in Error

vs

JOHN DUNCAN LAND AND MINING COMPANY

Defendant in Error

IN ERROR to the SUPREME COURT of the STATE of MICHIGAN

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BRIEF FOR DEFENDANT IN ERROR

Supreme Court of the United States

OCTOBER TERM 1907

No. 270

ALBERT H. RUSCH, Plaintiff in Error

vs

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Defendant in Error

IN ERROR to the SUPREME COURT of the STATE of MICHIGAN

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BRIEF FOR DEFENDANT IN ERROR

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Up to the time of preparing this brief we have not been served with a copy of the brief for plaintiff in error and we assume that we have no proposition to answer other than the questions raised in the trial court and in the Supreme Court of Michigan, viz: that act No. 229 of the Public Acts of Michigan 1897, as amended, is in contravention of the Constitution of Michigan and is also contrary to the Fourteenth amendment to the Constitution of the United States. (See Assignment of Errors, Record p. 26 to 27.)

In the month of August 1902 the plaintiff in error purchased from the State of Michigan tax titles to the lands involved in this case receiving two tax deeds therefor, one conveying a portion of the lands and the other conveying the remainder, each of which tax deeds contained the following proviso:

"Provided, however, That this indenture is subject to the relevant conditions imposed by Act No. 229 of the Public Acts of 1897 as amended." (See Record, p. 13.)

That act requires the grantee in a tax deed, before instituting proceedings to recover posession of the land, to serve upon the original owner, as shown by the records of the Register of Deeds office, a notice giving such original owner a period of six months from the time of service of such notice in which he may redeem said land by paying to the owner of the tax title the amount invested therein and one hundred (100) per cent in addition thereto and the further sum of Five ($5.00) Dollars for each description of land contained in the tax deed.

At the time plaintiff in error received these tax deeds the original owners were Patrick A. O'Donald, Chas. S. Draper and Henry Gamble.

In October 1902 plaintiff in error proceeded to serve upon these parties the redemption notice provided for by Act 229 of Public Acts of 1897. (See Record p. 3 and 4.)

Defendant in error acquired all the right, title and interest of O'Donald, Draper and Gamble subsequent to the service of the notice by plaintiff in error.

The notice served by plaintiff in error did not comply with the provision of the Statute and was held void by the Supreme Court of Michigan. (See Record p. 15 to 18.)

After having attempted to comply with the proviso contained in his tax deeds and the provisions of Act No. 229 of the Public Acts of 1897 and having served a tax notice which did not give the information which the law requires, the plaintiff in error now contends that he was not obliged to give the original owners any notice entitling them to redeem and that his title is absolute to the lands in question because the Act which he attempted to comply with is, in his opinion, contrary to the Fourteenth Amendment to the Constitution of the United States.

The defendant contends, FIRST, that this appeal should be dismissed for want of jurisdiction, because there is no federal question involved in the case. SECOND, if this Court has jurisdiction we contend that the decision of the Supreme Court of Michigan should be affirmed:

1. Because that decision is in accordance with the established law of the State in relation to the enforcement of its tax laws.

2. The plaintiff in error is estopped by his own action from raising the questions which he undertakes to raise, either in the

Courts of Michigan or in this Court. We shall discuss the questions in the order mentioned.

FIRST, There is no Federal question involved.

We fail to see how the provisions of Act No. 229 of the Public Acts of 1897 in any way violates the provisions of the Fourteenth Amendment to the Constitution of the United States. By that Amendment it is provided that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Wherein are his constitutional rights trampled upon? Wherein did the State of Michigan make a law which has abridged the privileges or immunities of the plaintiff in error, or deprived him of his property without due process of law?

Let us briefly examine the facts as shown by this record. The land involved was at the time of the trial in the Court below timber land and was worth at least $5,000 and was unoccupied and vacant land and never had been occupied. (See Record p, 12.)

The plaintiff in error bought tax titles on the land from the State of Michigan paying therefor the sum of Six Hundred forty eight and seventy-four one hundredths [$648.74] dollars [See tax notice p. 4 of record.] At the time of making such purchase he well knew the provisions of the Michigan tax law viz., that he would only get a conditional deed, that he must give six months notice to the original owners of the land giving them the right to redeem upon paying him back his money with one hundred (100) per cent profit, and the further sum of Five [$5.00] dollars for each description of land contained in his deed, and that upon their failure to pay or tender the redemption money within that period he would become the absolute owner, provided of course that his tax notice conformed to the provisions of the Statute. **He got what he purchased, no more, no less.** He undertook to serve the notice which the law provides for. The defendant in error as owner of the original title before commencing this suit offered to pay him the statutory amount to redeem which he refused to accept. Record p. 12.

He is deprived of no property rights. The decree of the Supreme Court of Michigan allows him one hundred (100 per

cent profit on his investment and eight description fees in addition, making in all a profit of $688.74. upon an investment of $648.74. Not satisfied with this large profit, the demon greed having taken possession of his soul, he reaches out for the entire property. Because the Supreme Court of Michigan said he must be satisfied with the profits which the tax law gives him he has appealed to this Court and invokes the aid of the Fourteenth Amendment. He says that **his property** has been taken from him without due process of law and that the privileges and immunities which are his as an American citizen are ruthlessly denied to to him. When and how was he ever the owner of the property? He never had a title to it at any time. He bought his tax deeds with full knowledge that they gave him no title; that the Supreme Court of Michigan had held that such tax deeds gave no right of possession and that one who entered upon land under such a deed without having first complied with the provisions of Act No. 229 of the Public Acts of 1897 was a trespasser. Section 142 af that act provides; "No purchaser under any tax sale hereafter made, or of any State tax land or any State bid hereafter sold, shall enter into possession of the land so purchased until six months after he has given notice to the party or parties in interest as provided for in the preceding sections."

The Michigan Supreme Court in construing this section said:

"The defendant must be presumed to know the law, of which his deed gave him notice. He was a trespasser in entering upon these lands, and is not entitled to pay for his improvements. He had not even a colorable right of entry."

Corrigan vs. Hinkley, 125 Mich., 125

This is the established law in Michigan and has been affirmed in the following cases:

Huron Land Co., vs. Robarge, 128 Mich., 686
Adkin vs. Pillen, 136 Mich., 682.
Griffin vs. Kennedy, 143 Mich., 583.
Holmes vs. Loud, 149 Mich., 410.

The law as above stated is well established in Michigan, and yet, the plaintiff in error claims to have been deprived of his property (property which he never owned) "without due process of law."

The Supreme Court of Michigan in passing on this question

in the case at bar said; "Defendant insists, also, that the statute provisions which have been considered are not constitutional because not within the title of the act and because in effect they provide for a forced transfer by one owning a title to lands. Various possible consequences of enforcement of the law are pointed out and claimed to amount to limitations of constitutional rights. It will not be profitable to follow, here, the discussion undertaken. The deeds which the defendant received from the state are expressly made subject to the relevant conditions imposed by act number 229, public acts of 1897, as amended. Whatever the title which the state held it sold to defendant an interest in the lands which was liable to be divested." [Record p. 18.]

"Where the decision of the Supreme Court of a State rests upon an independent ground not involving a Federal question and broad enough to maintain its judgment, the Supreme Court of the United States will not review the judgment."

Northern Pacific Railroad Co., vs. Ellis, 144- U. S.- 458

"Where the jurisdiction of the Supreme Court of the United States is invoked upon the ground that a right or immuninty specially set up and claimed under the Constitution or authority of the United States has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right so set up and claimed was expressly denied, or that such was the necesary effect in law of the judgment."

Roby vs. Colehour, 146-U. S-153

"To give the Supreme Court of the United States jurisdiction by writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the detirmination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

Walter W. Wood Mowing & R. Mach. Co. vs. Skinner, 139-U. S-293.

"Whether certain statutes of a State have or have not binding force is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, and raises no federal question giving the courts of the United States jurisdiction."

Duncan vs. McCall, 139-U. S.-449.

"Unless it appears affirmatively that the decision of a federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it, this court has no jurisdiction of a writ of error to a state court. In this case the judgment as rendered involved the decision of no such question, and none such was actually decided."

Morrow vs. Brinkley, 129-U. S.-178.

If this Court has jurisdiction on this Appeal we contend that the decision of the Supreme Court of Michigan should be affirmed.

FIRST: Because that decision is in accordance with the established laws of the State in relation to the enforcement of its tax laws. Act No. 229 of the Public Acts of 1897 has been the law in Michigan for nearly eleven (11) years, and all tax deeds that have been issued by the State since the passage of that act have been issued subject to its provisions. To disturb that enactment at this late day would result in great disorder. The Act has been construed by the Michigan Supreme Court many times and we will refer the Court to some of the decisions.

Even prior to the enactment of the present tax law our Supreme Court held that "purchasers of tax titles take no more than their deed gives them."

Reilly vs. Blaser, 61-Mich.-399-

In Monahan vs. Auditor General, where the present Act No. 229 of the Public Acts of 1897 was under consideration the Court said: "The Attorney General claims that by the expiration of redemption, the state by its purchase, became vested with absolute title, and that its vendee took a similar title. We may concede the first of these propositions without being compelled to admit the latter. The purchaser takes such title

as the law prescribes, subject to such conditions as the law makes."

Monahan vs. Aud. Gen. 136-Mich-247.

In Adkin vs. Pillen, our Court in discussing this question said: "It is to be inferred that some of the tax titles purchased by defendant had become absolute in the State before Act No. 229 of the Public Acts of 1897—the act which gives the right of redemption—took effect. Defendant acquired his deeds under section 72 of the general tax law (section 3895, 1 Comp. Laws) enacted 1893. By that section it is provided: 'Such deeds shall convey an absolute title to the land sold, and be conclusive evidence of title in fee in the grantee, subject, however, to all taxes assessed and levied on such lands subsequent to the taxes for which the same was bid off.'

Notwithstanding the fact that the State had acquired the absolute ownership of this land, and notwithstanding the language above quoted, the title acquired by defendant was, by Act No. 229 of the Public Acts of 1897, subject to redemption for a period of six months; and during this time defendant was not entitled to possession of the land. We have recently held (See Auditor General vs. Sherman, 136-Mich-157) that, notwithstanding the language of section 72, above quoted, the title thereby conveyed is subject to sale for prior taxes under certain conditions, by virtue of Act No. 169 of the Public Acts of 1899. It is equally clear that we are bound to hold that, by Act No. 229 of the Public Acts of 1897, said title acquired under section 72 did not become absolute—and this is true whether that title had or had not become absolute in the State before sale—until the period for redemption has expired. Until the expiration of this period, during which the original owner has the sole right of posession and the right to redeem from outstanding tax titles, such owner, and not the owner of said tax titles, which may or may not become absolute, is the owner of the property."

Adkins vs. Pillen, 136-Mich.,-682.

In Griffin vs Kennedy, our Supreme Court said:

"It is undoubtedly true that said Act No. 229 has the effect of giving to the former owner of the State tax lands a

title which formerly he did not possess. See Adkin vs. Pillen, 136, Mich. 682. But this title does not come into existence until the sale described in said act has been made. That, it seems to me, was the legislative intent, and I see no difficulty in giving it effect. It may be said that a sale under the general tax laws transfers all the title of the State; part of the title so transferred passes to the purchaser, and part to the original owner of the land, his mortgagee or grantee. I shall not undertake to give a technical name to each of these different titles. We can give effect to the legislative intent without performing that undertaking."

Griffin vs. Kennedy, 148-Mich.,-583, 587.

There are many other Michigan cases in which the decision in Adkin vs. Pillen has been affirmed, including the case at bar, but we think it unnecessary to quote from them.

"The courts of the United States as a general rule adopt and follow the decisions of the state courts, in questions which concern merely the Constitution and laws of the State.

Wherever the decisions of the state courts relate to some law of a local character which may have become established by those courts, or has always been a part of the law of the State the decisions of the state court upon the subject are usually conclusive, and always entitled to the highest respect in the federal courts."

Busher vs. Cheshire Railroad Co., 125-U, S-555
League v. Texas, 184 U.S. 156
Leeper v Texas 139 US 462

This Court has at the present term sustained another provision of the Michigan tax law, viz., that service of process upon a resident of the State by publication was not in contravention of the Fourteenth Amendment, and that the State may be left to enforce the collection of the taxes as it chooses.

Longyear vs. Toolan, (No. 177 Oct. term 1907)
209 U.S. 414

SECOND: Plaintiff in error is estopped from raising the question in this action because he voluntarily accepted the tax deeds which the Auditor General gave him, which were expressly made subject to the relevant provisions of Act No. 229

of the Public Acts of 1897. Having accepted the tax deeds in that form he can not claim anything more than the deeds give him. If he was not satisfied with the tax deeds which the Auditor General delivered to him he should have instituted a direct proceeding against that official to compel him to issue tax deeds conveying an absolute title, and then litigate the question directly with the State.

Plaintiff in error not only voluntarily accepted tax deeds issued subject to the provisions of Act No. 229 of the Public Acts of 1897, but he made an effort to comply with the provisions of that act when he caused the tax notices to be served upon the original owners of the land. The position which he now takes is most certainly inconsistent with the redemption notice which he undertook to serve upon the original owners.

We submit therefor; that this appeal should either be dismissed because there is no federal question involved, or the decision of the Supreme Court of Michigan should be affirmed.

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RUSCH *v.* JOHN DUNCAN LAND AND MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 53. Argued December 14, 1908.—Decided January 4, 1909.

The decision of the highest court of the State that a statutory notice complies with the statute is determinative.

Where title is taken subject to statutory provisions for redemption, the exercise of the right of redemption so reserved does not deprive the owner of his property without due process of law.

THE facts are stated in the opinion.

Mr. O. H. Reed, with whom *Mr. E. C. Chapin* was on the brief, for plaintiff in error.

Mr. J. F. Carey, with whom *Mr. C. C. Lancaster* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a bill in equity brought by defendant in error, hereinafter called the land and mining company, against plaintiff in error in the Circuit Court for the county of Gogebic, State of Michigan, to remove a cloud from the title to certain lands caused by a tax deed held by plaintiff in error, and to compel a reconveyance to that company of the land described therein.

The foundation of the suit and the questions in it depend upon the tax laws of the State.

The bill alleged that the land and mining company was the owner in fee simple of the lands, and that Albert H. Rusch, the plaintiff in error here, held a tax deed therefor, issued by the auditor general of the State for delinquent taxes for the years 1889 to 1901, both inclusive, for which plaintiff in error paid the sum of $648.74. That the deed was issued after the provisions of Act No. 229 of the Laws of 1897, Public Acts 294, went into effect, and that the notice given by plaintiff in error to the owners of the land of the sale to him did not comply

with the provisions of the tax law. It was alleged that plaintiff in error claimed absolute title to the land by virtue of the tax deed and the notice which he claimed to have served upon the then owners of the lands, because the six months allowed for redemption had expired and no redemption had been made. An offer by the land and mining company to refund the amount paid by plaintiff in error with the percentage and costs required by the laws is alleged.

The answer of plaintiff in error admitted certain of the allegations of the bill, denied others, and set up, with a recitation of circumstances, the sufficiency of the notice to cut off the right of redemption of the owners of the lands. And it alleged that the Act No. 229 of the Public Laws of 1897 with the amendments thereto violated certain sections of the constitution of the State of Michigan and the Fourteenth Amendment of the Constitution of the United States.

After proofs taken the Circuit Court dismissed the bill. The court held that the notice given by plaintiff in error to the predecessors in title of the land and mining company of the sale of the lands for taxes and the issuing of deeds therefor was sufficient under the statute to cut off the right of redemption, and considered that, in view of such holding, it was not necessary to pass on the constitutionality of Act No. 229. The Supreme Court of the State, however, decided that the notice was insufficient and reversed the decree of the Circuit Court. Plaintiff in error then sued out this writ of error, asserting jurisdiction in this court, because he contends a question under the Fourteenth Amendment of the Constitution of the United States is presented.

It will be observed that the Circuit Court held that the notice of the tax sale was sufficient and that the Supreme Court decided that it was insufficient. Of course, the decision of the Supreme Court is determinative, and equally, of course, if there is nothing else in the case but a matter of statutory construction, we have nothing to do with it. And that such is the case a brief statement will demonstrate.

In August, 1902, plaintiff in error purchased from the State, under the provision of its statutes, tax titles to the lands involved in this case, receiving two deeds therefor, one conveying a portion of the lands and the other conveying the remainder. Each deed contained the following proviso: "Provided, however, that this indenture is subject to the relevant conditions imposed by Act No. 229 of the Public Acts of 1897 as amended." That act requires the grantee in a tax deed, before instituting proceedings to obtain possession, to serve upon the original owner, as shown by the records in the office of the register of deeds, a notice giving such original owner a period of six months from the time of service of the notice in which he may redeem the property by paying to the owner of the tax title the amount invested therein, and 100 per cent in addition thereto, and the further sum of $5.00 for each description of land contained in the tax deed. Plaintiff in error attempted to give that notice and its sufficiency constituted the controversy in the state courts.

The trial court held it sufficient, as we have seen; the Supreme Court held it insufficient. The decision of the Supreme Court would seem to settle the meaning of the statute, and to get rid of the effect of the decision plaintiff in error attacks the constitutionality of the statute. He is put thereby in the dilemma of attacking the law upon which he relies for title. The argument by which this anomaly is sought to be sustained is somewhat involved, but, as we understand it, its ultimate reliance is the contention that by the proceedings under the tax laws the State acquired the absolute title to the lands and conveyed that title to plaintiff in error, and that the aim of Act No. 229 is to divest such title and transfer it to another, and therefore it is further contended the property of the plaintiff in error is taken without due process of law. There is also a contention, based upon the construction of the laws, that they are unequal in their operation.

If the title was taken subject to redemption it cannot be said to be divested without due process of law if redemption

was exercised according to law. And how redemption should be exercised and how it could be cut off depended upon the provisions of the statute and, therefore, the best answer to the assumption of plaintiff in error, that he acquired an indefeasible title, is the answer given by the Supreme Court of the State, whose province it is to pronounce the meaning of the statutes of the State without question by this court. The court said: "The deeds which the defendant received from the State are expressly made subject to the relevant conditions imposed by Act No. 229, Public Acts of 1897, as amended. Whatever the title which the State held, it sold to defendant [plaintiff in error] an interest in the lands which was liable to be divested." And the court sustained the bill and ordered a decree to be entered in accordance with its prayer.

Judgment affirmed.